Supreme Court, U.S.
FILED
06161 MAY 29 2007
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

ELROY CHESTER,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

SUSAN ORLANSKY*
JEFFREY M. FELDMAN
FELDMAN ORLANSKY &
SANDERS
500 L STREET, SUITE 400
ANCHORAGE, AK 99501
(907) 272-3538
**Counsel of Record*

CAPITAL CASE

Question Presented

The Texas Court of Criminal Appeals assessed petitioner's mental retardation using seven factors that rely heavily on the facts of the crime, have no basis in the scientific literature, and conflict with the well-accepted definitions of mental retardation recognized in *Atkins v. Virginia.* Despite petitioner's significantly subaverage intellectual functioning and significantly subaverage adaptive functioning, Texas declared him not mentally retarded and subject to the death penalty.

Does Texas defy *Atkins* and violate the Eighth Amendment by ordering a mentally deficient inmate put to death under a novel test of mental retardation that finds no support in any criteria accepted as rational and reliable measures of retardation?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding below are Elroy Chester and the State of Texas.

No party is a corporation.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceedings and Rule 29.6 Statement ii

Table of Contents iii

Table of Authorities iv

Opinions and Orders Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 1

A. Introduction 1

B. Chester's Trial And Events Preceding The *Atkins* Hearing 2

C. The *Atkins* Hearing 4

D. Decision Of The Texas Court Of Criminal Appeals 13

How The Federal Questions Were Presented 14

Reasons for Granting the Petition 15

I. Texas's Method For Assessing Mental Retardation Permits The Execution of Mentally Retarded Defendants, In Violation of *Atkins* and the Eighth and Fourteenth Amendments 15

A. Nationally Accepted Definitions Of Mental Retardation Reflect The AAMR And DSM-IV-TR Criteria 15

B. Texas Alone Uses A Definition Of Mental Retardation That Disregards Scientific Criteria For Measuring Adaptive Functioning..... 18

C. Using The *Briseño* Factors To Assess Mental Retardation Violates The Eighth Amendment, Because The *Briseño* Factors Do Not Reliably Determine Mental Retardation..... 20

1. Texas improperly excludes individuals with an antisocial personality from its definition of mental retardation..... 20

2. Texas improperly evaluates adaptive functioning through factors with no reliable relationship to mental retardation 22

3. Chester's case offers an excellent vehicle for enforcing *Atkins* in Texas..... 29

Conclusion 30

Appendices (bound separately)

Appendix A: Final Decision of the Texas Court of Criminal Appeals

Appendix B: Decision of the Trial Court

Appendix C: State Definitions of Mental Retardation and Adaptive Functioning

Appendix D: Texas Court of Criminal Appeals Decisions Post-*Atkins*

TABLE OF AUTHORITIES

Cases

Abdul-Kabir v. Quarterman,
127 S. Ct. 1654 (2007) 29, 30

Atkins v. Virginia,
536 U.S. 304 (2002) ..... *passim*

Blonner v. State,
127 P.3d 1135 (Okla. Crim. App. 2006) 16

Brewer v. Quarterman,
127 S. Ct. 1706 (2007) 30

Caldwell v. Mississippi,
472 U.S. 320 (1985) 23

Chester v. Cockrell,
62 F. App'x 556 (5th Cir.) (2003) (not selected for publication in the Federal Reporter) 4

Chester v. State,
No. 73,193 (Tex. Crim. App. unpublished decision delivered Jan. 26, 2000) 3

Commonwealth v. Miller,
888 A.2d 624 (Pa. 2005) 16

Ex Parte Bell,
152 S.W.3d 103 (Tex. Crim. App. 2004) 19

Ex Parte Blue,
___ S.W.3d___, 2007 WL 676194
(Tex. Crim. App. 2007) 18

Ex Parte Briseño,
135 S.W.3d 1 (Tex. Crim. App. 2004) ..... *passim*

Ex Parte Chester,
No. WR-45,249-01 (Tex. Crim. App. unpublished decision delivered May 31, 2000) 3

Ex Parte Chester,
No. WR-45,249-02 (Tex. Crim. App. unpublished decision delivered Sept. 10, 2003) 4

Ex Parte Modden,
147 S.W.3d 293 (Tex. Crim. App. 2004) 19

Ex Parte Stevenson,
No. AP-75,639, 2007 WL 841127
(Tex. Crim. App. unpublished decision
delivered Mar. 21, 2007) 19

Ford v. Wainwright,
477 U.S. 399 (1986) 22

Graham v. Collins,
506 U.S. 461 (1993) 29

Gregg v. Georgia,
428 U.S. 153 (1976) 19

Holladay v. Campbell,
463 F. Supp. 2d 1324 (N.D. Ala. 2006) 21, 27

Howell v. State,
151 S.W.3d 450 (Tenn. 2004) 17

Hughes v. State,
892 So. 2d 203 (Miss. 2004) 16

In re Hawthorne,
105 P.3d 552 (Cal. 2005) 16

Jones v. United States,
527 U.S. 373 (1999) 19

Lambert v. State,
126 P.3d 646 (Okla. Crim. App. 2005) 28

Limbach v. Hooven & Allison Co.,
466 U.S. 353 (1984) 15

Lockett v. Ohio,
438 U.S. 586 (1978) 29

Moore v. Quarterman,
No. Civ. A. 603 CV 224, 2005 WL 1606437
(E.D. Tex. July 1, 2005), *vacated on procedural grounds*, 454 F.3d 484 (5th Cir. 2006) 19

Penry v. Johnson,
532 U.S. 782 (2001) 30

Penry v. Lynaugh,
492 U.S. 302 (1989) 3

Penry v. State,
178 S.W.3d 782 (Tex. Crim. App. 2005) 18

Pruitt v. State,
834 N.E.2d 90 (Ind. 2005) 16, 18

Rivera v. Dretke,
No. Civ. B-03-159, 2006 WL 870927 (S.D. Tex. Mar. 31, 2006) 19

Romano v. Oklahoma,
512 U.S. 1 (1994) 20

Smith v. Texas,
127 S. Ct. 1686 (2007) 30

Smith v. Texas,
543 U.S. 37 (2004) 30

State v. Jimenez,
908 A.2d 181 (N.J. 2006) 16

State v. Lott,
779 N.E.2d 1011 (Ohio 2002) 16

Tennard v. Dretke,
542 U.S. 274 (2004) 28, 30

United States v. Cisneros,
385 F. Supp. 2d 567 (E.D. Va. 2005) 17

United States v. Nelson,
419 F. Supp. 2d 891 (E.D. La. 2006) 17, 27

Wiley v. State,
890 So. 2d 892 (Miss 2004) 16

Constitutional Provisions and Statutes

U.S. CONST. amend. VIII ..... *passim*

U.S. CONST. amend. XIV ..... *passim*

28 U.S.C. § 1257(a) 1

ARIZ. REV. STAT. § 13-703.02(K)(1) (2007) 17

CONN. GEN. STAT. § 1-1(g)(b) (2007) 17

11 DEL. CODE § 4209(d)(3)d.1 (2007) 16

FLA. STAT. ANN. § 921.137(1) (2007) 17

IDAHO CODE ANN. § 19-2515A(1)(a) (2007) 16

725 ILL. COMP. STAT. 5/114-15(d) (2007) 16

KAN. STAT. ANN. § 76-12b01(a) (2006) 17

LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1) (2006) 17

MO. ANN. STAT. § 565.030(6) (2007) 16

N.C. GEN. STAT. ANN. § 15A-2005(a)(1)(b) (2007) 16

TENN. CODE ANN. § 33-1-101(17) (2003) 17

TEXAS HEALTH AND SAFETY CODE § 591.003(13) (2007) 5

TEXAS HEALTH AND SAFETY CODE § 593.005(a) (2007) 23

UTAH CODE ANN. § 77-15a-102 (2006) 17

VA. CODE ANN. § 19.2-264.3:1.1(A)(ii) (2006) 16

WASH. REV. CODE ANN. § 10.95.030(2)(d) (2007) 17

Other Authorities

AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, USER'S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT - 10TH EDITION (2007) 25, 27

AMERICAN ASSOCIATION ON MENTAL RETARDATION: MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (10th ed. 2002) ..... *passim*

AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (9th ed. 1992) 4, 5, 9, 18

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. Text Revision 2000) ..... *passim*

THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS
(R.W. Conley et al. eds. 1992) 27

James W. Ellis & Ruth A. Luckasson: *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV.
414 (1985) 24, 27

M.L. WEHMEYER ET AL., TEACHING STUDENTS WITH MENTAL RETARDATION: PROVIDING ACCESS TO THE GENERAL EDUCATION CURRICULUM (2002) 24

M.L. Wehmeyer & S.B. Palmer, *Adult Outcomes for Students with Cognitive Disabilities Three Years After High School: The Impact of Self-Determination*, EDUCATION AND TRAINING IN DEVELOPMENTAL DISABILITIES (2003) 24

Petitioner Elroy Chester asks that this Court issue a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals ("TCCA") is an unpublished decision; it is available at 2007 WL 602607 and is attached as Appendix A. The opinion of the trial court is unreported and is attached as Appendix B.

JURISDICTION

The final judgment of the TCCA was entered on February 28, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that "cruel and unusual punishments [shall not be] inflicted." The Fourteenth Amendment provides in relevant part that no state may "deprive any person of life . . . without due process of law."

STATEMENT OF THE CASE

A. Introduction

This case raises important questions arising from Texas's evasion of the constitutional prohibition on executing defendants who suffer mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits a state from taking the life of a mentally retarded offender because mentally retarded individuals are not among the most blameworthy who deserve the most serious possible sanction, no matter how

horrific their crimes. Texas has nullified *Atkins* by defining mental retardation in such a way that the exemption from death that this Court mandated for the mentally retarded is unavailable to nearly everyone who can conceive and carry out a capital crime.

While the *Atkins* Court permitted states to adopt their own procedures for determining whether someone suffers mental retardation, this deference to the states did not authorize Texas to adopt a standard that permits the execution of mentally retarded offenders. To the contrary, this Court charged the states with "the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Id.* at 317 (internal quotes and punctuation omitted; emphasis added).

Elroy Chester demonstrated in the Texas state courts that he has mental retardation. His IQ is below 70. His adaptive functioning is significantly subaverage as measured by every accepted standard. The Texas Department of Criminal Justice admitted him to its Mentally Retarded Offenders Program when he was incarcerated for prior offenses at ages 18 and 20. Yet, for the purpose of determining his eligibility for the death penalty, the TCCA declared him "not mentally retarded" because he did not "pass" a seven-factor test that the TCCA created and applies in capital cases instead of the accepted criteria for evaluating adaptive functioning.

This Court should grant review to enforce *Atkins* and to provide directions to Texas to prevent the execution of mentally retarded offenders.

B. Chester's Trial And Events Preceding The *Atkins* Hearing

Elroy Chester was charged by Texas with capital murder in February 1998. [Clerk's Record ("CR") 2-3] Six months later, he pled guilty, and a jury assessed his punishment. [CR 4; App. A at 1] At the penalty phase trial,

school records, multiple IQ test scores from Chester's childhood, records from Texas's Mentally Retarded Offenders Program, and expert testimony were all presented to show that Chester has mental retardation. [Penalty RR 20:98-99, 21:14-23][1]

The prosecutor did not vigorously dispute that Chester is retarded. He argued that Chester's mental retardation could be considered an aggravating factor, rather than a factor that would warrant imposing a non-death sentence. Chester's attorney objected, but the objection was overruled. [Penalty RR 21:36-37][2] The jury imposed a death sentence. [Penalty RR 21:50-51]

Chester appealed his sentence. The TCCA denied the appeal.[3] Chester also filed a state habeas corpus proceeding, asserting (among other grounds) that he is mentally retarded and his execution would violate the Eighth Amendment to the Constitution. His first state habeas application was denied.[4] Chester timely filed a federal habeas petition, again raising the claim that he suffers mental retardation and his execution would violate the Eighth Amendment. The

---

1 Cites in the form "Penalty RR V:pp" refer to the Reporter's Record from Chester's penalty phase trial by Volume (V) and page numbers (pp). The evidence presented at the penalty phase is summarized in defense counsel's closing argument at Penalty RR 21:14-23. For the full defense evidence related to Chester's mental retardation, *see* Penalty RR 20:54-152, 26:Exhibits 29-42.

2 The argument is clearly improper in light of *Atkins*. It also illustrates how evidence of mental retardation was used, pre-*Atkins*, to enhance the likelihood a death penalty would be imposed. *See Atkins*, 536 U.S. at 321 (noting that "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury," citing *Penry v. Lynaugh*, 492 U.S. 302, 323-25 (1989)).

3 *Chester v. State*, No. 73,193 (Tex. Crim. App. unpublished decision delivered Jan. 26, 2000).

4 *Ex Parte Chester*, No. WR-45,249-01 (Tex. Crim. App. unpublished decision delivered May 31, 2000).

federal habeas application was *unresolved when Atkins was* issued. The Fifth Circuit dismissed Chester's federal case, without prejudice, to permit him to present his *Atkins* claim to the state courts.[5]

Following proper Texas procedures, Chester applied to the TCCA for leave to file a successive state habeas application. Based on the evidence that was presented in the penalty phase trial, the TCCA determined that Chester stated a prima facie case that he suffers mental retardation, and authorized the successive state habeas application.[6]

C. The *Atkins* Hearing

At the hearing conducted by the trial court, Chester again presented the evidence from the penalty phase trial, as well as substantial additional evidence.[7] He showed his long history of sub-70 IQ scores and evidence of significantly subaverage adaptive functioning. Again, Texas did not dispute much of the evidence, only the conclusion that Chester is mentally retarded.

Texas based its argument primarily on the so-called *Briseño* factors. *Ex Parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004), is Texas's leading case on mental retardation post-*Atkins*. In *Briseño*, the TCCA announced that, until the Texas legislature adopts a definition of mental retardation, Texas courts "will follow the AAMR [AMERICAN

---

5 *Chester v. Cockrell*, 62 F. App'x 556 (5th Cir. 2003) (not selected for publication in the Federal Reporter).

6 *Ex Parte Chester*, No. WR-45,249-02 (Tex. Crim. App. unpublished decision delivered Sept. 10, 2003).

7 *See* Reporter's Record ("RR") from the *Atkins* hearing 2:20-133, 3:5-50, 199-221 (expert witness Dr. David Ott), 3:242-80 (Chester's sisters), 4:6-68, 101-10 (Dr. Henry Orloff, former director of the Mentally Retarded Offenders Program), 117-68 (Elizabeth Segler, Chester's high school special education teacher), 6:Trial Ex. 3 (prison records), 7:Trial Ex. 42 (school records), 8:Ex. 2 (prison education records).

ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (9th ed. 1992)] or section 591.003(13) [of the Texas Health and Safety Code] criteria in addressing *Atkins* mental retardation claims." 135 S.W.3d at 8.

The AAMR and the Texas statute begin with the well-established clinical definition that mental retardation has three basic elements: (1) significantly subaverage intellectual functioning, (2) significantly subaverage adaptive functioning, and (3) onset before age 18.[8] These accepted definitions of mental retardation provide criteria for what it means to have significantly subaverage adaptive functioning.[9] However, the *Briseño* court ignored those criteria and enunciated seven other factors that Texas courts may consider in assessing adaptive functioning. 135 S.W.3d at 8-9.[10]

---

[8] *See Briseño*, 135 S.W.3d at 7; AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 1 (10th ed. 2002) [hereafter "AAMR 10th ed."]; *id.* at 22 (restating AAMR 9th ed. criteria); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 49 (4th ed. Text Revision 2000) [hereafter "DSM-IV-TR"]. *Atkins* cited and relied on the AAMR Ninth Edition and the DSM-IV-TR. *See Atkins*, 536 U.S. at 308 n.3.

[9] *See* AAMR 10th ed. at 23, 42, 74, 78 (dividing adaptive functioning into three major domains, listing representative skills within those domains, and defining "significantly subaverage adaptive functioning" as having an overall score two standard deviations below the mean on a standardized test assessing all domains or having significant deficits in any one area); *id.* at 22 (reprinting AAMR 9th ed. definition which lists ten adaptive skill areas and defines "significantly subaverage adaptive functioning" as having significant deficits in any two of those areas); DSM-IV-TR at 49 (following AAMR 9th ed.).

[10] The factors are "[1] Did those who knew the person best during the developmental stage – his family, friends, teachers, employers, authorities – think he was mentally retarded at that time, and, if so, act in accordance with that determination? [2] Has the person formulated plans and carried them through or is his conduct impulsive? [3] Does his conduct show leadership or does it show that he is led around by others? [4] Is his conduct in response to external stimuli rational and appropriate,

At the *Atkins* hearing, Chester proved that he tested repeatedly in the mentally retarded range on standardized IQ tests.[11] His full-scale IQ scores were:

Age	7	12	13	18	29
IQ	69	59	77	69	66

[RR 2:95-104, 6:Trial Ex. 3-229, 7:Trial Ex. 42-064, -190-91] Testimony explained why the one score over 70 is highly unreliable. [RR 2:109-17, 4:241-43] Since the first four tests were administered when Chester was 18 years or younger, there was no dispute that Chester's subaverage intellectual functioning had its onset before he was 18. The trial court rejected the substantial evidence of Chester's below-70 IQ and found that Chester had not shown he suffers significantly subaverage intellectual functioning. [App. B at 7-10] The TCCA later determined that this finding is not supported by the evidence in the record and held that Chester carried the burden of proving that he suffers significantly subaverage intellectual functioning, with an onset before age 18. [App. A at 8]

With respect to the requirement of significantly subaverage adaptive functioning, Chester presented evidence about his developmental years. Texas placed him in special education classes from second grade onward. His younger sister helped him with basic skills. Even as an adult, he never lived independently, but always lived with family who took care of him. He could not fill out a job

---

regardless of whether it is socially acceptable? [5] Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject? [6] Can the person hide facts or lie effectively in his own or others' interests? [7] Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" *Briseño*, 135 S.W.3d at 8-9.

[11] Texas generally accepts 70 as the cut-off point for determining whether someone should be classified as mentally retarded. *See Briseño*, 135 S.W.3d at 14 & n.54.

application. He never had a bank account or a driver's license. He never shopped or cooked for himself on a regular basis. [RR 3:268-78, 6:Trial Ex. 3-227-28, -231-32, 7:Trial Ex. 42-026, -036] Unquestionably, he never attained the adaptive functioning levels of an average adult.

When he was first incarcerated at age 18, and again at 20, the Texas prison system placed him in its Mentally Retarded Offenders Program. As part of the intake process, the Texas Department of Criminal Justice ("TDCJ") documented his poor adaptive functioning through observations, clinical interviews, and standardized testing. Chester scored 57 on a Vineland Adaptive Behavior Scales test, and 69 on a standard IQ test.[12] [RR 4:26-31, 51-53, 6:Trial Ex. 3-229; App. A at 9] No evidence impugned the validity of either test. [RR 3:20-22, 5:49-50] Under the guidelines of the AAMR, an overall score two standard deviations below the mean on a test such as the Vineland establishes that the individual has significantly subaverage adaptive functioning.[13] Texas's expert witness acknowledged that the proper diagnosis for a person who at the age of 18 had a full-scale IQ score of 69 and a contemporaneous Vineland score of 57 is "mentally retarded." [RR 5:83-84] Texas's expert also agreed that Chester had "pretty poor adaptive functioning" when he entered prison at age 18, with no significant improvement when he returned to prison at age 20. [RR 5:32]

---

12 The Vineland test is scored in the same manner as an IQ test, where 100 is the mean, and 70 is two standard deviations below the norm. A score of 57 on a Vineland test is a significantly subaverage score and indicates that 99.8% of all people have a higher level of adaptive functioning. [RR 3:20-22, 4:52-53, 5:50]

13 *See* RR 2:84-85, 3:20-22; AAMR 10th ed. at 74 ("A score of two standard deviations below the mean on a total score from an instrument that measures conceptual, practical, and social skills will . . . meet the operational definition of a significant limitation in adaptive behavior."); *id.* at 88 (the Vineland test has been shown to be a reliable and valid measure of mental retardation).

Besides proving his significantly subaverage Vineland score, Chester showed that he meets the criteria for classification as mentally retarded established by both the AAMR and the DSM-IV-TR. The AAMR Tenth Edition defines three domains of adaptive functioning and classifies a person as mentally retarded if he has significant deficits in one of those domains.[14] Undisputed testimony showed that Chester has significant deficits in at least two domains.

First, within the *conceptual* domain, Chester unquestionably has significant deficits in the representative skills involving language, reading, writing, and money concepts. [RR 3:7-14] His school and prison records reflect scores consistently at or below the third-grade level in reading and writing abilities. [RR 5:50-51] School records show significant oral communication difficulties as well, including the need to be in speech therapy for many years, for problems more profound than simple pronunciation errors. [RR 3:7-11, 13; RR 7:Trial Ex. 42-041-43, -062, -102, -111, -134, -143, -190, -311] School and prison records and the testimony of Chester's teacher establish his significant problems with arithmetic concepts, including understanding money. [RR 3:13-14, 4:127-30, 6:Trial Ex. 3-220, -230, 7:Trial Ex. 42-007, -066, -068]

Second, within the *practical* domain, the uncontroverted evidence showed Chester's significant deficits in the representative skill areas of occupational skills and abilities to engage in activities of daily living. In high school, Chester could not function in either of two off-campus vocational training programs, though in a sheltered

---

[14] *See* RR 2:83; AAMR 10th ed. at 74 ("For a person with mental retardation, adaptive behavior limitations are generalized across domains of conceptual, social, and practical skills. Because subscale scores on adaptive behavior measures are moderately correlated, however, a generalized deficit is assumed to exist even if the score on only one dimension meets the operational criteria of being two or more standard deviations below the norm.").

setting, doing simple tasks in his own school's cafeteria, he was a good worker. [RR 3:18, 4:161-63, 7:Trial Ex. 42-136, -149] After high school, he held only menial jobs, and most of them for only a short time; he was not referred for formal vocational training because his teachers did not believe he could be trained safely. [RR 3:17-18, 4:131-32, 165, 6:Trial Ex. 3-227, -231] The TDCJ documented Chester's significant deficits in work skills, and placed him in a simple occupational skills training program. [RR 3:28, 6:Trial Ex. 3-215, -227, -231, -233] Chester's deficits respecting activities of daily living are apparent in his never living independently at any time in his life. He always stayed with people who cared for him; he never shopped or cooked for himself on a regular basis and was never responsible for paying bills. He could not have managed those responsibilities. He never had a bank account or a driver's license. [RR 3:16-17, 34-35, 256-58, 275-79, 6:Trial Ex. 3-227-28, -231-32]

The AAMR Ninth Edition and DSM-IV-TR classify a person as having significantly subaverage adaptive functioning if he has deficits in two of ten listed areas.[15] Chester proved his significant deficits in at least three areas: communication, functional academics, and work. [RR 3:24][16] Chester's deficits with respect to communication (including significantly subaverage abilities to read, write, and speak) are discussed above, as are his significant deficits with respect to work and occupational skills. Functional academic deficits were demonstrated through school records that reflect his placement in special education classes from

---

15 The ten skill areas of the DSM-IV-TR are "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." DSM-IV-TR at 49. The DSM-IV-TR criteria are based on the identical approach in the AAMR Ninth Edition. *See* AAMR 10th ed. at 114 (listing the AAMR 9th ed. criteria).

16 Chester has deficits in the areas of self-direction and community use as well. [RR 3:24-25]

elementary school onward. [RR 3:268-69, 4:145, 249, 7:Trial Ex. 42-009-11, -016, -026, -036, -089, -102, -134, -138, -143, -148, -153, -209][17] Chester graduated from high school last in his class, and he graduated only because, as a special education student, he was not required to pass particular classes or demonstrate particular proficiencies. [RR 3:179-82, 189-90, 4:127-28, 136-37, 143, 7:Trial Ex. 42-327-31, 8:Ex. 2-000995] Achievement testing by the TDCJ confirmed Chester's significant deficits in functional academics; though placed in remedial classes by the prison system, Chester made very little progress and at age 27 continued to read only at the second-grade level. [RR 8:Ex. 2-000992]

Chester's expert witness, Dr. David Ott, a psychologist with substantial experience working with the mentally retarded, addressed the AAMR and DSM-IV-TR factors systematically and articulated, consistent with the preceding discussion, why Chester manifests significantly subaverage adaptive functioning that requires classifying him as mentally retarded using any of the recognized criteria. [RR 2:22-27, 83-85, 3:6-28] The objective testing (i.e., the 57 score on the Vineland test) and the assessments by the TDCJ corroborated Dr. Ott's conclusion, based on reviewing records and interviewing Chester, that Chester's adaptive functioning is significantly subaverage.

For the most part, Texas did not contest the evidence that Chester presented, only the conclusion that he is mentally retarded. Texas presented testimony from an educational diagnostician who never worked with Chester. She stressed that Chester's school records sometimes show he was classified as "learning disabled," rather than mentally retarded. [RR 4:197, 219] However, a learning disability requires a significant discrepancy between the

---

[17] Chester's failure to achieve academically was primarily a function of his intellectual deficits, not behavioral problems. School records reflect that generally he did not exhibit behavior problems. [RR 7:Trial Ex. 42-022, -031, -087, -103, -140, -150, -206]

individual's IQ scores and his scores on academic achievement tests. [DSM-IV-TR at 49; RR 2:40, 5:35] Chester's low IQ scores are consistent with his poor academic achievement scores. [RR 7:Trial Ex. 42-006, -007, -065-66, -137][18] Elizabeth Segler, a special education teacher who taught Chester throughout high school, explained that the Port Arthur Independent School District did not classify a child as mentally retarded so long as the child could be managed behaviorally within his home school's special education program, as Chester was. [RR 4:166-67] She regarded Chester as mentally retarded. [RR 4:168] Texas's expert witness agreed it was common for schools to label mentally retarded children "learning disabled," both to avoid the stigma of being retarded and to avoid the costs of special programs. [RR 5:34-35][19]

Texas's expert, psychiatrist Edward Gripon, conducted a classic forensic psychiatric interview with Chester, such as he would conduct to evaluate competency to stand trial; he did not consider the adaptive functioning criteria of the AAMR or DSM-IV-TR. [RR 5:15-16] He opined, based on his interview, that Chester is not mentally retarded, even though he agreed that the proper diagnosis for someone with an IQ score of 69 and contemporaneous Vineland score of 57, as Chester had at age 18, is "mental retardation." [RR 4:269-72, 5:83-84] He criticized neither test score and did not explain how, in light of the scores, he could declare that Chester does not have mental retardation.

Without referring to the *Briseño* factors by name, Dr. Gripon acknowledged that several are not diagnostic of

---

[18] The diagnostician also acknowledged that the Texas Educational Association does not follow the DSM-IV-TR or AAMR definitions of mental retardation. [RR 4:223-25]

[19] *See also* AAMR 10th ed. at 31-32 (reporting on nationwide studies that show the tendency of schools to classify mentally retarded children as "learning disabled," rather than "mentally retarded" to avoid stigmatizing the children).

mental retardation. He testified that laypeople, and even experts, often fail to notice mental retardation, because mentally retarded individuals tend to cover up, or mask, their disabilities. [RR 5:17-20] He testified that mentally retarded individuals most often are rational and can carry on a coherent conversation. [RR 5:16-17] He testified that individuals with mental retardation can be deceptive, and that the ability to lie to avoid being caught is not inconsistent with having mental retardation. [RR 5:23, 25-26]

In attempting to refute the testimony that Chester presented, Texas emphasized the facts of Chester's crimes, using the *Briseño* factors that focus on the defendant's crime to argue that Chester must not be retarded because he had the ability to plan and carry out crimes. [RR 5:122-49, App. B at 10-24, 28-29 (prosecution's proposed findings of fact adopted by the trial court)]

The trial court signed the proposed findings of fact that Texas submitted.[20] These findings stated that Chester did not meet his burden of proving either that he had an IQ of less than 70 or that he had significantly subaverage adaptive functioning. [App. B at 10, 28-29] With respect to the latter determination, the findings focused exclusively on the *Briseño* factors and did not in any way apply the criteria of the DSM-IV-TR or AAMR. [App. B at 10-29]

Under Texas procedures, a trial court judge in a state habeas case functions as a master, whose findings constitute a "recommendation" that is submitted to the TCCA for its review. In his brief to the TCCA, Chester challenged the trial court's heavy reliance on the *Briseño* factors, and argued that using these factors to assess adaptive functioning permits the trial court to find erroneously that the defendant does not

---

[20] Suggesting that the judge did not even carefully read what he signed, the judge initially signed findings submitted by the district attorney's office that were missing five pages from the middle. *See* Order signed July 23, 2004 (Crim. Dist. Ct. Jefferson Co.); *compare* Order signed July 26, 2004 (Crim. Dist. Ct. Jefferson Co.) [App. B].

suffer mental retardation, in violation of *Atkins* and the Eighth and Fourteenth Amendments.[21] Texas filed no brief defending the trial court's decision or the validity of the *Briseño* factors as a way to evaluate mental retardation.

D. Decision Of The Texas Court Of Criminal Appeals

The TCCA determined, first, that there was no dispute that evidence of mental retardation occurred and was recorded before Chester reached the age of 18. [App. A at 5] Second, the TCCA determined that Chester "met his burden in regard to demonstrating significant limitations in intellectual functioning." [App. A at 8] The TCCA called the trial court's contrary finding not supported by the record. [App. A at 6-8]

On the question of adaptive functioning, the TCCA accepted Chester's Vineland score of 57, and the testimony of Texas's expert witness that "a person with a Vineland score of 57, combined with an IQ of 69 as measured at the same time, would be correctly diagnosed as mildly mentally retarded." [App. A at 9] But the TCCA then deferred to the trial court's finding, based exclusively on the *Briseño* factors, that Chester did not demonstrate he has significantly subaverage adaptive functioning. [App. A at 9-19] Like the trial court, the TCCA focused exclusively on the *Briseño* factors and stressed Chester's criminal activity.[22] [App. A at

---

21 *See Ex Parte Chester*, No. WR-45,249-02, Brief of Applicant/Appellant at 57-58, 68-76.

22 The TCCA took as true all that Chester allegedly said in his "confessions" – which unquestionably are statements written out by a police officer and signed by Chester. [Penalty RR 19:67, 146-48 (acknowledging that police officers wrote each "confession" in a manner to "make some sense of it")] The "confessions" give accounts of events in chronological and articulate terms very far removed from Chester's own method of speaking. *Compare* Penalty RR 20:4-52 (Chester's testimony) *with* Penalty RR 19:138-42 (a typical "confession"). The TCCA gave no apparent consideration to this Court's reminder that mentally retarded

9-19] The TCCA did not comment on the fact that the trial court did not analyze the AAMR or DSM-IV-TR factors, nor did the TCCA conduct its own analysis of how these factors apply to the evidence in the record. The TCCA did not address Chester's challenges to the *Briseño* factors and why they are not a valid way to assess mental retardation.

In short, Chester is subject to execution under the TCCA's ruling solely because he failed to "pass" the unscientific *Briseño* test that Texas uses to assess adaptive functioning.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

As described above, Chester showed at the *Atkins* hearing that he is mentally retarded under every recognized scientific definition. He presented expert testimony that discredited the *Briseño* factors as a valid way to determine mental retardation. In his post-hearing briefing to the trial court and the TCCA, Chester expressly challenged the reasonableness of the *Briseño* factors. He argued to the TCCA that reliance on this set of unscientific factors permits execution of the mentally retarded in violation of the Eighth Amendment. [Applicant's Proposed Findings of Fact and Conclusions of Law at 53-56; Brief of Applicant/Appellant at 57-58, 66-76]

---

individuals are especially susceptible to confessing falsely to crimes they did not commit. *See, Atkins*, 536 U.S. at 320 & n.25. Chester never contested that he committed the crimes to which he confessed, but he did urge the trial court not to take at face value the descriptions of how he committed these crimes, since the "how" in the confessions reflects the police officers' abilities to organize the facts, not necessarily how Chester actually behaved. [Applicant's Proposed Findings of Fact and Conclusions of Law at 51-52] This difference becomes important when the "confessions" are used to find an ability to plan. *See* App. A at 16-17 (The "facts" of these crimes are based almost exclusively on the so-called "confessions.").

REASONS FOR GRANTING THE WRIT

I. TEXAS'S METHOD FOR ASSESSING MENTAL RETARDATION PERMITS THE EXECUTION OF MENTALLY RETARDED DEFENDANTS, IN VIOLATION OF *ATKINS* AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court is "concerned with federal issues and a contention that a state court disregarded a federal constitutional ruling of this Court." *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362 (1984). In *Atkins*, this Court held that the Eighth Amendment categorically prohibits the execution of mentally retarded offenders who commit capital crimes. This Court acknowledged what Texas will not: Mentally retarded people can conceive and carry out capital offenses. 536 U.S. at 306-07. Through Texas's use of the *Briseño* factors, Texas evaluates mental retardation in a way designed to exclude from the protection of *Atkins* most Texas defendants, including Chester, who are mentally retarded. This Court should grant certiorari to enforce *Atkins* in Texas.

A. Nationally Accepted Definitions Of Mental Retardation Reflect The AAMR And DSM-IV-TR Criteria.

Atkins is based on a national consensus regarding those who suffer mental retardation. That consensus is built on a shared understanding of what mental retardation is, based on the widely accepted and well-established definitions developed by leading national mental health and disability organizations, such as the American Association on Mental Retardation and the American Psychiatric Association. This Court cited those definitions and the statutes of states that incorporate those definitions. 536 U.S. at 308 n.3, 314-17 & n.22. While this Court did not direct all

states to adopt those precise definitions, this Court clearly expected that all jurisdictions that impose a death penalty would adopt definitions that "generally conform" to the established definitions. 536 U.S. at 317 n.22. This Court thus foresaw little difficulty in the states' developing definitions of mental retardation consistent with the definitions around which the national consensus against executing the mentally retarded has formed, though there would be factual disputes over whether specific defendants met those definitions. *See id.* at 317 & n.22.

This Court was mostly correct. Five years after *Atkins,* most states with a death penalty have a definition of mental retardation, developed by the legislature or by case law, that the courts of those states employ when deciding whether a criminal defendant does or does not suffer mental retardation. All of those states adopt the three-part definition of the AAMR and the DSM-IV-TR.[23] Nine states specifically incorporate the skill areas of the AAMR Ninth Edition and the DSM-IV-TR as part of the definition of "significantly subaverage adaptive functioning"[24]; one uses the three domains of the AAMR Tenth Edition[25]; four others suggest that the AAMR and DSM-IV-TR skill areas provide useful guidance.[26] Seven states use other definitions entirely

---

[23] Appendix C includes a table that provides the statutory and/or case law citations for the definition of mental retardation used in capital cases, and the definitions (if any) that states have developed for assessing "significantly subaverage adaptive functioning."

[24] *See* DEL. CODE tit. 11g § 4209(d)(3)d.1 (2007); IDAHO CODE ANN. § 19-2515A(1)(a) (2007); 725 ILL. COMP. STAT. 5/114-15(d) (2007); *Hughes v. State,* 892 So. 2d 203, 216 (Miss. 2004); *Wiley v. State,* 890 So. 2d 892, 895 (Miss. 2004); MO. ANN. STAT. § 565.030(6) (2007); N.C. GEN. STAT. ANN. § 15A-2005(a)(1)(b) (2007); *State v. Lott,* 779 N.E.2d 1011, 1014 (Ohio 2002); *Blonner v. State,* 127 P.3d 1135, 1139 (Okla. Crim. App. 2006); *Commonwealth v. Miller,* 888 A.2d 624, 630-31 (Pa. 2005).

[25] *See* VA. CODE ANN. § 19.2-264.3:1.1(A) (2006).

[26] *See In re Hawthorne,* 105 P.3d 552, 556-57 (Cal. 2005); *Pruitt v. State,* 834 N.E.2d 90, 108 (Ind. 2005); *State v. Jimenez,* 908 A.2d 181, 184 n.4 (N.J.

compatible with the AAMR and DSM-IV-TR criteria for establishing "significantly subaverage adaptive functioning."[27] Courts applying the federal death penalty statute also have developed standards for assessing adaptive functioning based on the AAMR and DSM-IV-TR criteria.[28] Texas alone follows a totally different course.

To be constitutional under *Atkins*, a state's definition of mental retardation "must encompass all defendants that 'fall within the range of mentally retarded offenders about whom there is a national consensus.'" *United States v. Cisneros*, 385 F. Supp. 2d 567, 570 (E.D. Va. 2005) (quoting *Atkins*, 536 U.S. at 308 n.3). The widespread use of the AAMR and DSM-IV-TR standards reflects that those definitions embody the national consensus concerning who suffers mental retardation.

The Indiana Supreme Court understood the significance of *Atkins* and the widespread use of the AAMR and DSM-IV-TR criteria:

> Although *Atkins* recognized the possibility of varying state standards of mental retardation, the grounding of the prohibition in the Federal Constitution implies that there must be at least a nationwide minimum. The Eighth

---

2006); *Howell v. State*, 151 S.W.3d 450, 458 (Tenn. 2004) (quoting TENN. CODE ANN. § 33-1-101(17) (2003)).

[27] *See* ARIZ. REV. STAT. ANN. § 13-703.02(K)(1) (2007); CONN. GEN. STAT. § 1-1g(b) (2007); FLA. STAT. ANN. § 921.137(1) (2007); KAN. STAT. ANN. § 76-12b01(a) (2006); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1) (2006); UTAH CODE ANN. § 77-15a-102 (2006); WASH. REV. CODE ANN. § 10.95.030(2)(d) (2007). Most of these definitions are drawn from the narrative section of the DSM-IV-TR entry on mental retardation. *See* DSM-IV-TR at 42 ("*Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected by someone in their particular age group, sociocultural background, and community setting.").

[28] *See, e.g., United States v. Nelson*, 419 F. Supp. 2d 891, 894-95 (E.D. La. 2006); *United States v. Cisneros*, 385 F. Supp. 2d 567, 570 (E.D. Va. 2005).

> Amendment must have the same content in all United States jurisdictions. Accordingly, we conclude that states are free to impose a higher standard, but the minimum definition of mental retardation sufficient to meet the national consensus found in *Atkins* must be uniform. . . . [I]f a state's definition of mental retardation were completely at odds with definitions accepted by those with expertise in the field the definition would not satisfy the prohibition.

Pruitt v. State, 834 N.E.2d 90, 108 (Ind. 2005).

B. Texas Alone Uses A Definition Of Mental Retardation That Disregards The Scientific Criteria For Measuring Adaptive Functioning.

Rather than evaluate "significantly subaverage adaptive functioning" using the accepted standards of the AAMR and DSM-IV-TR, Texas made up its own standards. The TCCA purported to adopt the *Briseño* factors as auxiliary to the AAMR Ninth Edition definition, but the court's analysis in Chester's case -- and in others -- shows that the *Briseño* factors often impermissibly supplant the AAMR and DSM-IV-TR criteria. Appendix D lists most of the post-*Atkins* decisions by the TCCA analyzing whether an individual convicted of capital murder subsequently proved he suffers mental retardation. Most opinions contain no analysis, making it impossible to know what standard for assessing adaptive functioning was used.[29] The TCCA has

---

[29] A few cases that disclose the standards used contain no reference at all to the *Briseño* factors. *See, e.g., Ex Parte Blue*, __ S.W.3d __, 2007 WL 676194 at *8-9 (Tex. Crim. App. 2007); *Perry v. State*, 178 S.W.3d 782, 785, 790 (Tex. Crim. App. 2005) (noting, with apparent approval jury instructions that followed the AAMR Ninth Edition and DSM-IV-TR criteria rather than the *Briseño* factors). By making reliance on the *Briseño* factors optional, Texas violates a central tenet of this Court's death penalty

found that only seven defendants have mental retardation. Reportedly, in six of those cases, the prosecution conceded the mental retardation finding.[30] In other words, in only one case has a Texas court applying the *Briseño* factors found mental retardation following a contested hearing.[31] This track record manifests that Texas plainly intends to continue to execute people who commit heinous crimes, even when they suffer mental retardation.[32]

Any method for evaluating mental retardation that systematically allows the execution of mentally retarded offenders is unconstitutional. In ignoring the national consensus defining mental retardation, Texas makes a mockery of *Atkins* and violates the Eighth Amendment.

---

jurisprudence: In order to be constitutional, the death penalty may not be imposed through sentencing procedures that create a substantial risk that death will be inflicted in an arbitrary or capricious manner. *See, e.g., Jones v. United States*, 527 U.S. 373, 381 (1999) ("the Eighth Amendment requires that a sentence of death not be imposed arbitrarily"); *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (states must "minimize the risk of wholly arbitrary and capricious action").

30 The state's agreement that the defendant suffers mental retardation is explicit in *Ex Parte Modden*, 147 S.W.3d 293, 295 (Tex. Crim. App. 2004), and *Ex Parte Stevenson*, No. AP-75,639, 2007 WL 841127 at *1 (Tex. Crim. App. unpublished decision delivered Mar. 21, 2007).

31 The single exception is *Ex Parte Bell*, 152 S.W.3d 103 (Tex. Crim. App. 2004).

32 At least twice, after the TCCA did not find sufficient evidence even to state a prima facie case of mental retardation, a federal district court subsequently found that the preponderance of the evidence proves that the defendant suffers mental retardation. *See Rivera v. Dretke*, No. Civ. B-03-159, 2006 WL 870927 (S.D. Tex. Mar. 31, 2006); *Moore v. Quarterman*, No. Civ. A 603 CV 224, 2005 WL 1606437 (E.D. Tex. July 1, 2005), *vacated on procedural grounds*, 454 F.3d 484 (5th Cir. 2006). Neither district court accepted the *Briseño* factors as a valid way to assess adaptive functioning. *See Rivera*, 2006 WL 870927 at *26; *Moore*, 2005 WL 1606437 at *5 & n.6.

C. Using The *Briseño* Factors To Assess Mental Retardation Violates The Eighth Amendment, Because The *Briseño* Factors Do Not Reliably Determine Mental Retardation.

"States must properly establish a threshold below which the [death] penalty cannot be imposed. . . . To ensure that this threshold is met, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) (internal quotation marks and citations omitted; emphasis added). Undisputed testimony establishes that the answers to at least six of the seven *Briseño* questions have little, if any, rational connection to whether someone is mentally retarded. An individual may have the "wrong" answer with respect to any or all of the *Briseño* factors and still be mentally retarded under every recognized definition. Reliance on the *Briseño* factors as a basis for deciding whether someone will live or die violates the Eighth Amendment.

1. Texas improperly excludes individuals with an antisocial personality from its definition of mental retardation.

Texas's method for determining mental retardation begins with a false dichotomy. The TCCA described the seven *Briseño* factors initially as a way to determine if someone has mental retardation or an antisocial personality disorder. 135 S.W.3d at 8. No scientific understanding of mental retardation supports drawing this distinction. Mental health professionals recognize that someone can have both mental retardation and an antisocial personality

disorder.[33] Indeed, antisocial conduct may evidence lack of adaptation to community living. *See Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1345 (N.D. Ala. 2006).

Finding that someone is not mentally retarded because he manifests an antisocial personality makes virtually an empty set of *Atkins*'s categorical exclusion of the mentally retarded from those most blameworthy individuals eligible for the death penalty. Most people convicted of capital murder could be diagnosed as having an antisocial personality. *Atkins* held that, if those people are mentally retarded, they may not be executed. The *Atkins* dissenters protested that the majority opinion would exempt people, such as Atkins, who committed heinous crimes. *See Atkins*, 536 U.S. at 350-51 (Scalia, J., dissenting) (suggesting that the majority opinion requires no consideration at all of the depravity of the crime). The dissenting Justices understood that the majority opinion requires that some individuals who commit very horrible crimes will avoid being executed because they have mental retardation, which reduces their individual culpability, reduces the effectiveness of any sanction as a deterrent, and increases the likelihood that death will be imposed in spite of factors that call for a less severe sanction. *See id.* at 350-52 (discussing *id.* at 320-21). By excluding capital defendants with antisocial personalities from the group of defendants who may not be executed because they are mentally retarded, Texas flouts the key premise of *Atkins* and denies defendants such as Chester their rights under the Eighth Amendment.

---

[33] *See* AAMR 10th ed. at 172 ("In general, mental health disorders are much more prevalent in this population [of individuals with mental retardation] compared to the general population. . . . The types of mental health disorders are the same in people with and people without mental retardation."); DSM-IV-TR at 45 ("Individuals with Mental Retardation have a prevalence of comorbid mental disorders that is estimated to be three to four times greater than the general population. . . . All types of mental disorders may be seen."); RR 2:41-42 (an individual can be both mentally retarded and mentally ill).

2. Texas improperly evaluates adaptive functioning through factors with no reliable relationship to mental retardation.

Even if the *Briseño* factors were not designed erroneously to "distinguish" defendants with mental retardation from defendants with antisocial personality disorders and were employed merely as a way to evaluate adaptive functioning, they are invalid and violate defendants' rights under the Eighth Amendment, because these factors are almost entirely unrelated to any valid definition of mental retardation. The *Briseño* opinion does not explain the derivation of the factors, but the opinion suggests that the list was developed by Texas judges without benefit of relevant scientific expertise. Thoughtful testimony from the experts in this case, corroborated by the scientific literature, establishes that the *Briseño* factors, separately and combined, have negligible relevance to the diagnosis of mental retardation, because a factfinder could find the "wrong" answers to most of the questions even when the applicant in fact suffers mental retardation.

"In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). Only highly unreliable factfinding is possible when courts analyze mental retardation using the *Briseño* factors.

First question: "Did those who knew the person best during the developmental stage . . . think he was mentally retarded at that time, and, if so, act in accordance with that determination?" Answering "no" to this question does not indicate that the person is not mentally retarded, because the question ignores the uncontested fact that mental retardation cannot reliably be diagnosed by laypeople, in part because mentally retarded people often cover up their deficits. [RR 2:63, 86-88, 5:17-20] As the experts in Chester's case testified, the full extent of a mentally retarded person's deficits often

are not apparent to the people around him. [RR 2:62-63, 86-88, 5:17-20] Texas's expert acknowledged that mental retardation can go unnoticed by people who are not trained regarding what to look for; that is why typically experts, not laypeople, must make a diagnosis of mental retardation. [RR 5:17] In the social services context, Texas requires that a diagnosis of mental retardation be supported by expert opinion. *See* Texas Health & Safety Code § 593.005(a) (2007) ("A physician or psychologist licensed to practice in this state or certified by the department shall perform the determination of mental retardation."). Where life or death in a criminal case turns on a determination of mental retardation, Texas may not be permitted to rely on lay opinions that are less reliable than the diagnoses Texas demands before providing social services to its mentally retarded citizens. The Eighth Amendment imposes a "heightened need for reliability in the determination that death is the appropriate punishment in a specific case." *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (internal quotes omitted). Because it is of little significance that people who knew the defendant during his developmental stage did not recognize that he was mentally retarded, a negative answer to *Briseño*'s first question does not indicate that the person is not mentally retarded.[34]

---

[34] On the other hand, because of the great capacity of some people to cover up their retardation, it is significant when, despite an individual's efforts to mask retardation, others recognize him as mentally retarded and treat him that way. In Chester's case, family, teachers, and the Texas Department of Criminal Justice recognized him during his developmental period as different and slower than other children, and some formally labeled him mentally retarded. *See, e.g.*, RR 3:268-69; 4:249; 7:Trial Ex. 42–026, -036 (Chester was in special education classes from elementary school onward), RR 3:270-79 (his younger sister had to help him with school work, house chores, and shopping), RR 4:168, 7:Trial Ex. 42-312 (his school district's educational diagnostician labeled him mentally retarded in elementary school, and his high school special education teacher considered him to be mentally retarded), RR 4:31; 6:Trial Ex. 3-229, -233

Second question: "Has the person formulated plans and carried them through or is his conduct impulsive?" According to both the defense expert and Texas's expert, mentally retarded people can perform many activities that require formulating and carrying out plans. [RR 2:63-65, 5:23-26] The DSM-IV-TR states that mentally retarded individuals with an IQ in the range of 55-70 "usually achieve social and vocational skills adequate for minimum self-support" and "can usually live successfully in the community." DSM-IV-TR at 43. Those skills plainly require planning and not purely impulsive behavior.[35] A sizeable body of research shows that mentally retarded individuals can learn to set goals and make and carry out plans.[36] Furthermore, as shown by the TCCA's analysis in Chester's case [App. A at 11-19], the *Briseño* question invites an intense focus on a single act -- such as whether the defendant's crime appeared impulsive or reflected some planning -- and that

---

(the TDCJ placed him in the prison's Mentally Retarded Offenders Program).

[35] *See also* Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 423, 474-75 & nn. 340, 342 (1985) (noting that most mentally retarded individuals fall in the range of "mildly mentally retarded" – i.e., with an IQ in the range of 55-70 – and a disproportionate number of those who become criminal defendants are in this range because the more profoundly retarded are often institutionalized and, if they commit crimes, are likely to be found incompetent); RR 2:61 (similar testimony). The mildly mentally retarded undeniably possess some ability to plan. In citing the clinical definitions of mental retardation as a category, as distinct from the subclassification for "severe mental retardation," the *Atkins* Court plainly did not intend to exclude approximately 85% of all mentally retarded individuals from the scope of its protections.

[36] *See, e.g.*, M.L. WEHMEYER ET AL., TEACHING STUDENTS WITH MENTAL RETARDATION: PROVIDING ACCESS TO THE GENERAL EDUCATION CURRICULUM (2002); M.L. Wehmeyer & S.B. Palmer, *Adult Outcomes for Students with Cognitive Disabilities Three Years After High School: The Impact of Self-Determination*, EDUCATION AND TRAINING IN DEVELOPMENTAL DISABILITIES (2003).

mistakes the point of an adaptive functioning assessment. The AAMR Tenth Edition at 17 states: "Adaptive behavior encompasses the application of conceptual, social, and practical skills to daily life. Its assessment should relate to an individual's typical performance during daily routines and changing circumstances, not to maximum performance."[37] Thus, an affirmative answer to the second question does not indicate that the defendant is not mentally retarded, especially when the answer is based on review of the defendant's crime.[38]

Fourth question: "Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?" Again, a "yes" answer does not indicate that the person is not mentally retarded. As the former Director of the Texas Department of Criminal Justice's Mentally Retarded Offenders Program testified, "Irrationality is more characteristic of mentally ill, usually psychotic individuals than mentally retarded. Mentally retarded people are not considered irrational." [RR 4:62] Texas's expert concurred that most mentally retarded people are rational: "[I]f you saw a substantial degree of irrationality you would look for the presence of Axis I diagnostic entry or some kind of mental disorder or mental illness." [RR 5:16] Consequently, the absence of tendencies to be irrational and inappropriate does not signal an absence of mental retardation.

Fifth question: "Does he respond coherently, rationally, and on point to oral or written questions, or do his responses wander from subject to subject?" Testimony by experts for both sides establishes that answering this

---

37 *Accord* AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, USER'S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT - 10TH EDITION at 4 (2007) [hereafter "AAIDD"]. AAIDD is the new name for the former AAMR.

38 No testimony about the third question was presented.

question does not help determine whether a person has mental retardation. The former director of the Mentally Retarded Offenders Program testified that, if a person is able to respond coherently, it "[c]ertainly does not" mean he is not mentally retarded; to the contrary, most individuals with mental retardation are capable of communicating coherently. [RR 4:63] "Disorganized speech (e.g., frequent derailment or incoherence)" is a characteristic of schizophrenia and other psychotic disorders. DSM-IV-TR at 312, 332. Texas's expert observed that, whether a person can respond rationally, coherently, and on point to questioning, without wandering from subject to subject, is really a test of competency to stand trial. [RR 5:16-17] Mental illness and incompetency are very different from mental retardation. No recognized text on mental retardation includes inability to carry on a conversation as a diagnostic criterion. The DSM-IV-TR at 43 states that most people in the mild mental retardation range (IQ 55-70) "develop social and communication skills during the preschool years . . . and often are not distinguishable from children without Mental Retardation until a later age. . . . During their adult years, they usually achieve social and vocational skills adequate for minimal self-support . . . ." Therefore, an affirmative answer to the fifth question does not indicate that the defendant is not mentally retarded.

Sixth question: "Can the person hide facts or lie effectively in his own or others' interests?" The State's expert testified that mentally retarded people can put forth deceptive behaviors and lie about whether they have done something wrong. [RR 5:23, 25-26] Therefore, an affirmative answer to this sixth question does not indicate that the defendant is not mentally retarded.

Seventh question: "Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" Like the second question, this question erroneously focuses on what may be the individual's maximum performance, not his typical

everyday adaptive functioning. The focus on criminal behavior contradicts the nation's foremost authority on mental retardation, which states bluntly: "Do not use criminal behavior or verbal behavior to infer level of adaptive behavior or about having [mental retardation]." AAIDD at 22. As the TCCA's analysis in Chester's case exemplifies, Texas uses this final question as a way to "rule out" mental retardation based on the fundamentally mistaken premise that any individual "smart enough" to commit a capital offense must not be "dumb enough" to be mentally retarded and therefore avoid execution. No professional, scientific definition of mental retardation supports this assumption. The professional literature in the field of mental retardation has recognized for many years that mentally retarded individuals can commit crimes.[39]

Courts outside of Texas recognize that focusing on the facts of the crime is not a constitutionally acceptable way to determine whether the defendant suffers mental retardation. In *United States v. Nelson*, 419 F. Supp. 2d 891, 902 (E.D. La. 2006), the court wrote that the defendant's "behavior in these isolated incidents has limited relevance to the mental retardation diagnosis because it is isolated, in contrast to the recurring patterns which emerge from all of the records in this case and which indicate a low level of adaptive functioning." Similarly, in *Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1347 (N.D. Ala. 2006), the court observed that, when there is "little doubt that if [the defendant] and his history had been examined before the date of his subject offenses, a finding of mental retardation would have been made," that same finding must be made after the crime,

---

[39] *See, e.g.*, THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS (R.W. Conley, et al. eds. 1992); Ellis & Luckasson, *supra* n.35. Texas recognized the capacity of mentally retarded offenders to commit crimes by creating the Mentally Retarded Offenders Program within the Texas Department of Criminal Justice; it hardly excluded individuals from that program because they had shown the capacity to plan and carry out crimes.

because a series of violent incidents does not mean the defendant is not mentally retarded.

The Oklahoma Court of Criminal Appeals, in *Lambert v. State*, 126 P.3d 646, 659 (Okla. Crim. App. 2005), also correctly recognized that emphasis on the facts of the crime, rather than systematic analysis of adaptive functioning under professionally recognized criteria, is not a constitutionally acceptable way to decide mental retardation. *Lambert* is like Chester's case in that the state did not contest mental retardation before *Atkins*; prosecutors argued that mental retardation could be an aggravating factor. Post-*Atkins*, when the state disputed the defendant's mental impairment, the state (as in Chester's case)

> largely failed to address [the defendant's] claims of deficits in adaptive functioning in specific areas over the years. Instead, the State relied almost exclusively on evidence of [the defendant's] past criminal activity, arguing that he was not mentally retarded but had chosen a life of crime. These choices do not suggest an attempt to comply with either the spirit or letter of the law prohibiting the execution of the mentally retarded.

Id. The Oklahoma appellate court vacated the trial court's determination that the defendant was not mentally retarded. In that decision, Oklahoma followed the spirit and letter of *Atkins*. Texas does not.

Texas's emphasis on the facts of the crime runs afoul not just of *Atkins* but also of *Tennard v. Dretke*, 542 U.S. 274 (2004). *Tennard* made clear that Texas may not require a criminal defendant, as a condition of avoiding execution, to show a nexus between any mitigating factor, including mental retardation, and the crime he committed. *Id.* at 287. Answering *Briseño*'s seventh question directs the trier of fact into the forbidden inquiry whether the defendant's mental retardation has a nexus with the crime; if the crime looks too sophisticated, the court will find no nexus, and Texas will

allow the defendant to be executed. Most of the TCCA's opinion in Chester's case focused on whether the court believed Chester's crimes could have been committed by a person with mental retardation. [App. A at 11-19]

3. Chester's case offers an excellent vehicle for enforcing *Atkins* in Texas.

Texas deemed Chester not mentally retarded solely because he failed the *Briseño* test. The trial judge believed the answers to the *Briseño* questions compelled him to find that Chester is not mentally retarded, without the need to analyze Chester's adaptive functioning using the AAMR or DSM-IV-TR criteria. [App. B at 9-29] The TCCA deferred to the trial court's finding, and reinforced it with its own analysis based exclusively on the *Briseño* factors. [App. A at 9-19] As shown above, by relying on the *Briseño* factors, Texas classifies as "not retarded" many people, such as Chester, who in fact suffer mental retardation.

When the choice is between life and death, a procedure that "'creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.'" *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1674-75 (2007) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). *See also id.* at 1672 (reiterating that a constitutional defect occurs when the trier of fact "'ha[s] no reliable means of giving mitigating effect'" to the evidence the defendant proffers to spare his life (quoting *Graham v. Collins*, 506 U.S. 461, 475 (1993) (emphasis added)). Texas uses an unreliable method of determining mental retardation, and applied it to Chester.

Texas routinely applies this Court's Eighth Amendment decisions to give them as narrow an effect as possible, attempting to preserve its right to execute individuals that this Court has held the Constitution protects from the death penalty. This Court has had to instruct Texas

repeatedly to ensure its decisions are enforced.[40] Texas repeats this pattern by limiting *Atkins* so severely as to make its protections almost meaningless.

Many Texas defendants have wrongly been denied relief under *Atkins* because of Texas's reliance on its *Briseño* factors. Absent review by this Court, many more will be executed. Chester's case offers an ideal vehicle for instructing Texas to follow *Atkins* and exempt from execution all defendants who are mentally retarded, regardless of the nature of their crimes. Unlike other defendants who claim to be mentally retarded, Chester met his burden of proving his significantly subaverage intellectual functioning and its onset in the developmental period, and he proved his significantly subaverage adaptive functioning under all the recognized standards. He is subject to execution only because he "failed" Texas's unauthorized *Briseño* test.

CONCLUSION

This Court should grant certiorari to correct Texas's disregard of *Atkins* and to enforce the Eighth Amendment's prohibition against executing the mentally retarded.

Respectfully submitted,
Susan Orlansky (Counsel of record)
Jeffrey M. Feldman
500 L St. # 400
Anchorage AK 99501
(907) 272-3538

May 29, 2007 By: Susan Orlansky

---

[40] *See, e.g., Brewer v. Quarterman*, 127 S. Ct. 1706 (2007); *Smith v. Texas*, 127 S. Ct. 1686 (2007); *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007); *Smith v. Texas*, 543 U.S. 37 (2004); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Penry v. Johnson*, 532 U.S. 782 (2001).

Supreme Court, U.S.
FILED

061616 MAY 29 2007

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

ELROY CHESTER,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

SUSAN ORLANSKY*
JEFFREY M. FELDMAN
FELDMAN ORLANSKY & SANDERS
500 L STREET, SUITE 400
ANCHORAGE, AK 99501
(907) 272-3538
**Counsel of Record*

TABLE OF CONTENTS

APPENDIX A: Final Decision of the Texas Court of Criminal Appeals

APPENDIX B: Decision of the Trial Court

APPENDIX C: State Definitions of Mental Retardation and Adaptive Functioning

APPENDIX D: Texas Court of Criminal Appeals Decisions Post-*Atkins*

APPENDIX A

Final Decision
of the Texas Court of Criminal Appeals

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AP-75, 037

Ex parte ELROY CHESTER, Applicant

Application for a Writ of Habeas Corpus

Case 76044 of the 252nd Judicial District Court of

Jefferson County

Womack, J., delivered the opinion of the Court in which Keller, P.J., and Meyers, Johnson, Keasler, Hervey, Holcomb, and Cockran, JJ., joined. Price, J., dissented.

The applicant in this habeas corpus case is sentenced to death. Under Article 11.071 of the Code of Criminal Procedure, he seeks relief from the sentence on the ground that he is mentally retarded and it would be cruel and unusual punishment to put him to death.[1] The court in which he was convicted has found the evidence insufficient to support the claim. Because the record supports that finding, we deny relief.

Procedural History

The applicant pleaded guilty to capital murder. Our law requires that a jury decide punishment in a case in which

---

[1] *See Atkins v. Virginia*, 536 U.S. 304 (2002).

death is a possible penalty.[2] At the punishment phase, the facts of the offense (which we shall discuss below) were undisputed. After hearing evidence of the offense and other evidence relevant to the punishment issues, the jury returned findings that required the trial court to enter a sentence of death.[3] On the appeal that followed, [4] we affirmed the judgment and sentence.[5] We denied habeas corpus relief on Chester's first petition.[6]

This second petition is permitted because the Supreme Court's decision applying the Cruel and Unusual Punishments Clause to a death sentence against a mentally retarded person[7] had not been delivered when Chester filed his first petition.

The convicting court held an evidentiary hearing on the petition. It received evidence that included expert testimony on the issue of mental retardation, the results of various Intelligence Quotient (IQ) tests, and evidence as to the applicant's adaptive behavior functioning. After considering the evidence presented, the trial court entered findings of fact and conclusions of law, ultimately ruling that the applicant had failed to meet his burden to prove his mental retardation by a preponderance of the evidence.

---

[2] *See* Code Crim. Proc. Art. 1.13.

[3] *See id.*, art. 37.071, § 2(a)-(g).

[4] *See id.*, § 2(h).

[5] *Chester v. State*, No. 73,193 (January 26, 2000) (not designated for publication).

[6] *Ex parte Chester*, WR-45,249-01 (May 31, 2000) (not designated for publication).

[7] *Atkins*, *supra* note 1.

Appendix A - 3

The Briseno Factors

The applicant now claims that the trial court used an improper standard in finding that he was not mentally retarded.

In another case on a claim for habeas relief on such a ground, *Ex parte Briseno*,[8] we decided that courts should use the definitions of mental retardation as stated by the American Association of Mental Retardation (AAMR),[9] and in the Health and safety Code,[10] and we suggested a series of questions to help fact-finders determine whether applicants have "deficits in adaptive behavior."[11]

---

[8] 135 S.W.3d 1 (Tex. Cr. App. 2004).

[9] "Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The disability originates before age 18.

"Five assumptions essential to the application of the definition:

"1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.

"2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.

"3. Within an individual, limitations often coexist with strengths.

"4. An important purpose of describing limitations is to develop a profile of needed supports.

"5. With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve."

American Association of Mental Retardation, Definition of Mental Retardation (2002).

[10] Health & Safety Code § 591.003(13) ("Mental Retardation means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.")

[11] "1. Did those who knew the person best during the developmental stage - his family, friends, teachers, employers, authorities - think he was mentally retarded at that time, and, if so, act in accordance with that determination?

Essentially, this results in a three-part test to determine whether an applicant suffers from mental retardation such that *Atkins* relief is warranted. First, whether the applicant has significant limitations in intellectual functioning, which typically appears in the form of low IQ scores. Second, whether these limitations were accompanied by significant deficits in adaptive functioning, usually expressed by limited conceptual, social, and practical skills. Third, whether these limitations occurred and were recognized before the age of eighteen.

The applicant bears the burden to prove these factors by a preponderance of the evidence, in order to show that he or she is mentally retarded.[12] As in all habeas corpus applications, the trial court makes findings of fact and conclusions of law concerning a claim of mental retardation. We will accord almost total deference to those factual findings, as long as they are supported by the record, and particularly when they are based on an evaluation of credibility and demeanor.[13] If the trial court's ruling is not

---

"2. Has the person formulated plans and carried them through or is his conduct impulsive?

"3. Does his conduct show leadership or does it show that he is led around by others?

"4. Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

"5. Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

"6. Can the person hide facts or lie effectively in his own or others' interests?

"7. Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" *Briseno, supra* note 8, at 8-9.

[12] *Id.*, at 12.

[13] *Id.*, at 12-13.

supported by the record, however, we may reject those findings.[14]

In the case at hand, there is no dispute as to the third part of the test, that the evidence in favor of a finding of mental retardation occurred and was recorded before the applicant reached the age of eighteen. The applicant's objections to the trial court's findings concern only the first and second factors. We shall address them in turn.

As to the first factor - the applicant's low IQ scores - there does seem to be a legitimate dispute with the findings entered by the fact-finding habeas court. In the "Findings of Fact" submitted by the trial court, the applicant's IQ test results were listed as follows:

1. Weschsler Intelligence Scale for Children (WISC-R) administered by the Port Arthur Independent School District (PAISD) in March 1977, when applicant was seven years old.
    1. Verbal Score = 77
    2. Performance Score = 69
    3. **Full Scale Score = 69**

1. WISC-R administered by the PAISD in March 1982, when applicant was twelve years old.
    1. Verbal Score = 64
    2. Performance Score = 63
    3. **Full Scale Score = 69**

1. WISC-R administered by the PAISD in February 1983, when applicant was thirteen years old.
    1. Verbal Score = 70
    2. Performance Score = 87
    3. **Full Scale Score = 77**

---

[14] *Id.*, at 13.

1. Weschsler Adult Intelligence Scale (WAIS) administered by the Texas Department of Corrections in 1987, when the applicant was eighteen years old.

1. Verbal Score = 70
2. Performance Score = 69
3. **Full Scale Score = 69**

The trial court found a number of problems and concerns with the IQ evidence presented. First, the trial court noted that there was conflicting testimony regarding the validity of the applicant's IQ test scores, particularly regarding the large discrepancy between the results of the 1982 and 1983 tests. The trial court eventually concluded that this testimony rendered the 1982 and 1983 test results inconclusive as to the applicant's actual intellectual functioning at the time. The trial court also took issue with the fact that the first three tests were all WISC-R tests, which are no longer in use and have now been replaced by the WISC-III test, which has never been administered to the applicant. The court noted that the WISC-III test was designed to counter criticisms of cultural bias within the WISC-R test, and that using the WISC-R test would not adequately account for cultural, regional, or other types of factors that may have influenced the applicant's test results. Finally, the trial court noted that the Texas education system requires that, in order for a student to be classified as mentally retarded, his or her test results must be below 70 for both verbal and performance scores, not only the full scale score. Taking all of these concerns into account, the trial court concluded that the applicant had failed to persuade the court that his intellectual functioning supported a finding of mental retardation.

Our review of the record, however, shows that the applicant's test scores were misstated in the trial court's findings, specifically in two places. First, in the first test, the

findings report the applicant's performance score as a 69, when in fact the record shows he scored a 65 (the full scale performance score was still correct). Secondly, in the second test, the findings show the applicant with a full scale score of 69, when the record shows he actually received a full scale score of 59 on his second test. Given that the trial court's findings on the applicant's test scores were in conflict with the record, we now reject the court's findings on this issue, and substitute the correct scores as noted here.

With the scores as corrected, the record shows the applicant had his intelligence tested four times in his first eighteen years of life. On three of those occasions, the applicant was assessed a full scale score below 70, including a score of 59 when he was twelve years old. The only time he was scored above a 70 was in 1983, when he scored a 77. There was testimony by the applicant's expert witness that, in his opinion, this score was invalid due to the fact that the test was administered only eleven months after the previous test, thus increasing the likelihood of "practice effects" in its administration.

Although there is no clear number which experts agree will in every case mark the border between what is or is not "significantly subaverage intellectual functioning" as stated in the AAMR's definition of mental retardation, a full scale score of 70 is generally regarded as the benchmark from which a diagnosis of at least mild mental retardation may be made.[15] Regardless of his higher 1983 score, we find the applicant's evidence of subaverage intellectual functioning persuasive. The applicant's scores were otherwise consistent

---

[15] IQ scores alone are generally not relied upon to support a diagnosis of mental retardation, but the "mild" range of mental retardation generally implies an IQ level in the range of between 50-55 and approximately 70. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000); *Atkins*, *supra* note, 1 at 309 n.3.

with a diagnosis of at least mild mental retardation. We note in particular the fact that the State's expert witness acknowledged on cross-examination that, despite his reluctance to classify the applicant as mentally retarded, a person with similar IQ scores (as well as the adaptive functioning score, discussed below) would properly be diagnosed as mildly mental retarded. The applicant has met his burden in regard to demonstrating significant limitations in intellectual functioning.

That leaves us with the second factor – adaptive functioning – which, due to its inherently subjective nature, is consistently the most problematic issue for factfinders to resolve when dealing with these types of claims.[16] In *Briseno*, we acknowledged this difficulty and offered seven evidentiary factors to assist factfinders in weighing evidence tending to support or refute a finding of adaptive behavior deficits when evaluating mental retardation claims.[17] As we made clear, however, these factors were intended only to be guidelines for trial courts to work with until the Legislature was to reconvene and establish conclusively both the substantive laws and the procedures that would bring our codes into compliance with the mandate issued by *Atkins*. Yet to this day, no such guidance has been provided by the Legislature. Thus, the temporary suggestions we offered in *Briseno* remain today the only judicial standards governing this unique type of claim under Article 11.071.[18]

---

[16] *Briseno, supra* note 8, at 8 ("The adaptive behavior criteria are exceedingly subjective, and undoubtedly expert will be found to offer opinions on both sides of the issue in most cases."); *see also Ex parte Rodriquez*, 164 S.W.3d 400, 405 (Tex. Cr. App. 2005) (reiterating same concern) (Cochran, J., concurring).

[17] *Briseno, supra* note 8, at 8-9.

[18] Code Crim. Proc. Art. 11.071.

The application in his brief criticizes the *Briseno* factors as inadequate for the purpose of accurately evaluating the adaptive behavior deficits of any given applicant. He points specifically to the Vineland Adaptive Behavior Survey as a more reliable alternative. The applicant was administered the Vineland test in October 1987 upon entering the Mentally Retarded Offender Program (MROP) of the Texas Department of Criminal Justice, and he received a score of 57. As noted above, even the State's expert witness at the hearing acknowledged that a person with a Vineland score of 57, combined with an IQ of 69 as measured at the same time, would be correctly diagnosed as mildly mentally retarded.

Persuasive as that may be, we cannot substitute our own judgment for that of the factfinder, so long as the findings are supported by the trial record.

The Applicant Has Not Shown Significant Deficits in Adaptive Behavior

The trial court's findings addressed all seven evidentiary factors listed in *Briseno*, and noted carefully how the applicant had failed to persuade the trial court on each one. For example, in response to the first *Briseno* questions ("Did those who knew the person best during the developmental stage - his family, friends, teachers, employers, authorities - think he was mentally retarded at that time, and, if so, act in accordance with that determination?"), the trial court found that the applicant had been classified during his school years as "learning disabled," rather than as mentally retarded. Conflicting testimony was presented regarding the flexible and often confusing standards under which such classifications were made in the Port Arthur Independent School District. Nevertheless, the trial court considered and found more credible the testimony of Vicki Pitman, a

diagnostician and witness for the State. Pitman testified that the applicant's school records labeling him as learning disabled were accurate, and that having a learning disability is not the same thing as being mentally retarded. The trial court likewise was unpersuaded by the applicant's witness Elizabeth Segler, who was the applicant's teacher and who said that, in her opinion, the applicant was moderately retarded. The trial court found Segler's testimony to be contradictory, in that she also testified that the applicant was "certainly" capable of learning if given proper teaching methods, which is also consistent with having a learning disability.

The trial court made similar findings in regards to the planned, rather than impulsive, nature of the applicant's conduct as shown by the facts of the case itself, as well as to the fact that in all of his crimes he acted independently of others instead of being led around. The court found no evidence in either the trial record or the hearing to establish that the applicant's conduct in response to external stimuli was irrational or inappropriate, regardless of its social acceptability.

As to whether the applicant responded coherently and rationally to oral or written questions, the trial court considered the testimony of both parties' experts regarding an evaluation of the applicant conducted by Dr. Ed Gripon, the State's expert. The court was more persuaded by Dr. Gripon's testimony that the applicant was able to converse with him coherently on a wide variety of topics, including current politics, the concept of parole violations, and many specific facts of the crimes to which the applicant had confessed. The trial court also noted the discrepancy in credentials between the two experts, particularly that, while Dr. Gripon had been practicing in the field of psychiatry for thirty-two years and had testified in Texas courts on issues

of mental retardation numerous times, the applicant's expert had been licensed for six years, in which time he had held a total of seven jobs, none for longer than two years. The trial court found the State's expert's testimony to be more credible.

The trial court also found that the applicant was capable of hiding facts and lying to protect his own interests, as demonstrated by the episode in which he told the investigators that he would take them to where he had hidden his gun, all the while apparently planning to get to the gun himself before the investigators could. Finally, the court found that the specifics of the various crimes to which the applicant confessed, including the use of masks and gloves, his practice of cutting exterior phone lines before entering homes to burglarize, and his deliberate targeting of victims like Cheryl DeLeon and his brother-in-law Albert Bolden, showed persuasively that the applicant was capable of forethought, planning, and complex execution of purpose.

The Facts On the night of February 6, 1998, Erin DeLeon, age seventeen at the time, was home alone with her one-year-old son Tony. Erin and Tony lived in the home of Erin's mother, Kim Ryman DeLeon, along with Erin's sisters Claire and Sasha. After putting Tony to bed, Erin spoke briefly on the phone with her boyfriend, and then began watching a movie in the living room.

Unbeknownst to Erin, the applicant was outside the house, watching her. He had been walking through her neighborhood, searching for a place to burglarize. He had with him a pair of gloves, a knitted hat in which he had cut two holes to make a ski mask, and a gun which he had stolen in a previous burglary. He had scratched the serial numbers off of the gun. Upon reaching the Ryman home, he recognized it as one he had burglarized previously. He

watched Erin through the open window blinds and, when it appeared that she was home alone, he went around the side of the house and cut the phone lines, which he later said was his normal practice when committing a burglary. He checked the side door to the house and found it unlocked. The applicant put on his mask and gloves, and entered the house through the side door. That door opened into the kitchen, which he entered, and then came into the living room where Erin was.

The applicant grabbed Erin by the hair, held the gun to her head, and demanded money or jewelry. Erin replied that they had a little jewelry, but no money, in the house. The applicant then took her through the house, still holding her by the hair, searching her mother's and sisters' bedrooms to confirm that no one else was at home. He asked Erin where her mother was and if she was coming home. Erin said her mother would be home in the morning. He then asked Erin who she had been on the phone with earlier. Erin replied that she had spoken with her boyfriend.

The applicant then took Erin into her mother's bedroom, from which he took some jewelry. He then did the same in her sisters' and in Erin's own bedroom. He took her to the dining room, and then had her turn off all remaining lights in the home. He then took her into the garage, still pulling her by the hair.

Once in the garage, Erin offered to turn on the lights but the applicant refused. Instead, he began feeling around in the dark until he found a roll of duct tape. Erin later testified that she believed by the way he was feeling around that the applicant knew exactly what he was looking for in the dark garage.

As they re-entered the house, Erin's sister Claire was arriving at the side door with her boyfriend Tim. They attempted to enter through the side door but the applicant had made Erin lock it, so Claire knocked on the door. The applicant pulled Erin by her hair toward the door and, while hiding behind her with his gun pointed at her head, ordered Erin to unlock the door and let her sister into the house. When Claire entered the house, the applicant pushed Erin forward and yelled at Claire to not say anything or he would "blow her [Erin's] head off." Claire began to babble incoherently and Erin tried to quiet her.

Tim, still unaware of what was happening, was still outside on the porch and asked Claire what was wrong. The applicant ordered Claire to tell Tim that nothing was wrong and that he should leave. Claire complied, but Tim persisted, and the applicant then told him directly to come into the house. Tim's car was still running, so he asked the applicant if he could turn it off first, and the applicant said yes, but if Tim attempted to leave that he would kill both girls. Tim went to turn off his car ignition, and then entered the house.

Once inside, the applicant, still holding Erin by her ponytail and with the gun pointed at her head, demanded jewelry or money from Claire and Tim. They said they had none – Tim showed the applicant his empty wallet, and Claire went to her mother's bedroom to confirm that there was no more jewelry in the house. When Claire returned, the applicant asked Tim what kind of car he had, and specifically whether it was an automatic or a stick shift. Erin later testified that she presumed from those questions that the applicant was thinking of using Tim's car to escape. The applicant then ordered Claire and Tim into the bathroom.

Alone with Erin in the dining room, the applicant ordered her to remove her clothes. Erin began to do so. The applicant tried to remove her bra himself, and did remove her underwear himself. Erin was now kneeling and wearing only her socks, and the applicant used the duct tape to blindfold her. The applicant then called for Tim to come out of the bathroom. The applicant ordered Tim to strip, and Tim removed all of his clothes except for his underwear and socks. The applicant then used the duct tape to blindfold Tim, and to bind his wrists and ankles. After that, the applicant dragged Tim into Erin's bedroom.

The applicant returned to the dining room and ordered Claire to come out of the bathroom. He ordered Claire to remove her clothes, and she complied. The applicant then blindfolded Claire with the duct tape, and seated her on the floor next to Erin. Erin then removed the tape over her eyes enough to see the applicant unzipping his pants and removing his mask, but the applicant came over to push the tape back down over her eyes.

The applicant then raped Erin vaginally, on the floor, next to her sister. When he was done and had removed himself from on top of her, Erin tried to get up, but the applicant pulled her over to where he was now sitting in a chair, and forced her to perform oral sex on him. The applicant kept the gun next to Erin's forehead and threatened to shoot her if she tried to bite him. After the oral sex, Erin moved to the floor area at one side of the room, and the applicant ordered Claire to perform oral sex on him, which she did. The applicant repeated the same threat that he would shoot her if she bit him.

At this point, a car approached the house. The applicant heard the car, ran into the kitchen to dress himself, and then went to stand by the side door to wait for the person

approaching, who turned out to be Willie ("Billy") Ryman, Kim Ryman's brother and the girls' uncle. Billy would often come to the house to check on the girls, when he knew their mother was at work. Billy opened the door and turned on the light. The applicant yelled at him to come inside and, upon entering, the applicant shot him. Billy fell to the ground immediately, and the applicant dragged his body into the kitchen, where Billy eventually died. The applicant then ran out of the house. Claire got up and locked the side door, locking the applicant out of the house.

Billy's girlfriend Marcia Sharp had been waiting outside in Billy's truck in the driveway while he went up to the house. Marcia heard the gunshot fired at Billy but thought perhaps it was a car backfiring. Moments later, she saw the applicant run out of the house and then try to go back in, after realizing he had been locked out by Claire. The applicant then approached the truck on the passenger side, where Marcia was sitting. The door was unlocked but, just as the applicant reached for the handle, Marcia locked it. The applicant was now wearing his mask again. The applicant pulled out his gun and shot once at the lock on the car door. He then noticed that the driver's door was unlocked, so he ran around to the driver's side of the truck, but Marcia quickly reached over and locked that door, too. The applicant shot twice at the lock on the driver's door, but it did not open. He then stepped back, looked at Marcia, and shot twice more at the driver's door window. None of the gunshots hit Marcia. The applicant then ran down the street, away from the house.

The events at the Ryman Deleon home were the culmination of a six-month spree of criminal activity by the applicant, in which he burglarized at least five residences, sexually assaulted two people, murdered at least five people, and fired shots at no fewer than five others. Among the crimes

that the applicant eventually confessed to committing during this period were the following:

- •**The burglary and homicide of John Henry Sepeda.** Like the case at hand, the applicant used wire cutters to cut the phone lines to Sepeda's home before entering it, he wore a mask which he had brought with him, and he carried a gun. He also carried a flashlight. The applicant entered the bedroom where Sepeda and his wife were sleeping, and began to burglarize the room while they slept. Sepeda woke up, and approached the applicant, who shot and killed him. Before fleeing, he demanded that Sepeda's wife give him a ring that she was wearing.

- •**The murder of Albert Bolden**, the applicant's common-law brother-in-law. He gave two reasons to the police for his motive: Bolden had been beating his sister, and/or Bolden had set him up on a date with a woman who turned out to be a transvestite. The applicant invited Bolden to commit a burglary with him, and brought him to a vacant home he knew of in Port Arthur. In fact, the applicant had no intention of burglarizing the home and instead admitted that he just wanted to kill Bolden. After leading Bolden to the vacant home, the applicant directed him to walk through the door first, and then shot him in the back of the head. The applicant then fled the scene and hid the gun that he used.

- •**The burglary and homicide of Etta Stallings.** Again, the applicant wore a ski mask, carried a gun and a flashlight, staked out the home beforehand to see who was there, and cut the phone lines outside before breaking into the home. As in the Sepeda case, he attempted to burglarize the home while

Stallings and her husband were asleep, but Stallings woke up. She pulled a gun out of her dresser drawer, and the applicant shot her, killing her. The applicant then took the property he had stolen, as well as Stallings' gun, and stashed it all under a nearby vacant house.

- •**The murder of Cheryl DeLeon.** The applicant knew DeLeon because they had worked together at a local Luby's restaurant for eleven months in or around 1992. He admitted he would often sexually harass her, and she would complain about it to their boss. Knowing that she still worked at Luby's, the applicant likewise knew that she got off work at 8:00 in the evening. After it had gotten dark outside, the applicant went to DeLeon's home. As in the case at hand, he was wearing a mask, carrying a gun, and wearing gloves. This time, he unscrewed the lightbulb illuminating a storage shed near the back door of her house, so that he could lay in wait under cover of darkness. He laid down on the ground by the storage shed, and waited thirty to forty-five minutes in the dark until DeLeon's car pulled into the driveway. As DeLeon got out of her car and walked to her back door, the applicant ran up and grabbed her. They struggled, she screamed, and he hit her in the side of the head with the gun. According to the applicant, the gun went off accidentally when he hit her with it, shooting her dead. The applicant then fled to his father's home, where he hid the gun in the attic.

The Port Arthur police arrested him. While in custody, and after being asked to provide a blood sample, the applicant told investigator Timothy Smith that he would take him to where the gun that was used in the crime was located. The

applicant knew Smith and seemed to trust him more than he did the other officers. Smith, two other investigators from the District Attorney's office, and two local detectives then accompanied the applicant to his father's house. The applicant was wearing a jail jumpsuit, as well as leg restraints attached by a chain to another chain around his waist, which in turn connected to a pair of handcuffs, thereby shackling his wrists to his waist, such that his mobility was extremely limited.

Upon reaching his father's house, the applicant attempted to move ahead of the others. Smith had admonished the applicant that he would not be allowed to handle or touch the gun himself, but the applicant insisted that he would have to locate the gun personally because it was in a place that difficult to reach. The applicant assured Smith that the gun was unloaded, and that he himself was the only one who would be able to reach it.

The applicant led the others to his bedroom and, despite efforts to prevent him from moving ahead too quickly, walked over near his bed and dragged a small nightstand to a position directly underneath a hole in the ceiling. The applicant began to climb on top of the nightstand, but was quickly told to stop. One of the investigators, Rose, then climbed on top of the nightstand to look in the hole, and the applicant directed him to look in a specific direction for the gun. Rose looked and reached around inside the hole as directed by the applicant, but could not find the gun. The applicant then climbed atop the same nightstand where Rose was standing and, while continuing to direct Rose to look in the same direction he had previously indicated, attempted to reach with his shackled hands in the opposite direction from where he had told Rose to look.

Smith had been watching the applicant the entire time and, when he saw the applicant reach with his hands in the other direction, drew his gun and ordered the applicant to stop moving. The applicant was taken down from the nightstand and escorted to sit on a nearby couch. Smith then climbed atop the nightstand himself and looked in the direction where the applicant had attempted to reach. He immediately saw the gun and retrieved it. The gun was fully loaded.

Conclusion

The trial court did not err in concluding that the applicant failed to meet his burden of proving he was mentally retarded. The application for habeas corpus relief is denied.

Delivered February 28, 2007.

Do Not Publish.

APPENDIX B

Decision of the Trial Court

Cause No. 76044-B

THE STATE OF TEXAS	*	**IN THE CRIMINAL**
VS.	*	**DISTRICT COURT OF**
ELROY CHESTER	*	**JEFFERSON COUNTY, TEXAS**

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the Applicant's Application for Writ of Habeas Corpus, the Respondent's Original Answer, the evidence produced at hearing and all evidence previously presented and found within the trial records in Cause No. 76044 and 76044-B, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Applicant, Elroy Chester, was indicted and convicted of the felony offense of Capital Murder in Cause No. 76044 in the Criminal District Court of Jefferson County, Texas.

A. After the jury affirmatively answered the first and second special issues, the trial court assessed punishment at death by lethal injection.

B. The Court of Criminal Appeals affirmed the applicant's conviction in an unpublished opinion delivered January 26, 2000.

2. Applicant filed an Application for Post Conviction Writ of Habeas Corpus, asserting via the United States Supreme Court opinion in ***Atkins v. Virginia, 536 U.S. 304 (2002)*** that Applicant's execution would violate the Eighth Amendment prohibition against the execution of the mentally retarded. Applicant further submitted in his Application the argument that the death sentence imposed violated the Sixth Amendment of the United States Constitution because there has been no jury determination on the issue of mental retardation.

Issue Regarding the Constitutional Prohibition Against Execution of the Mentally Retarded

3. This Court considered the entirely of the evidence presented on the issue of mental retardation by both the Applicant and the State (Respondent), including the presentation of expert testimony, took judicial notice of all previous proceedings involving Applicant, and all testimony and exhibits introduced during the capital murder trial. (RR.III-81)

4. The Court was provided with expert testimony on the issue of mental retardation from both parties. Psychologist, Dr. David Ott testified on behalf of Elroy Chester. The testimony of Dr. Ott reflected that at the time of his testimony he was a clinical supervisor for the Montgomery County, Ohio Board of Mental Retardation and Disability and that he maintained a side practice. (RR.II-8) The Court noted that having been licensed for six years, Dr. Ott, who testified that Elroy Chester was mentally retarded, has held a total of seven jobs, the longest of which was for two years. He has held his current position for nineteen months. (RR.III-56-67) Dr. Edward Gripon who testified for the State, that Elroy Chester was not mentally retarded. Dr. Gripon has been either training or practicing in the field of

psychiatry since 1972 (32 years), and has testified in Texas courts on issues of mental retardation on many occasions. (RR.III-263-266)

5. The evidence presented established that mental retardation is a developmental disorder that is characterized by limitations in intellectual functioning and adaptive behavior that is present before the age of eighteen. (RR.II-39) Mental Retardation definitions involve a score on an individually administered IQ test, of less than 70, combined with significantly sub-average intellectual functioning with the onset of those concurrent deficits prior to age eighteen. (RR.II-43) Adaptive functioning involves making individual choices and decisions by the individual. (RR.II-47) Extensive testimony was presented by Applicant and by the State on the issue of whether Elroy Chester is mentally retarded. After hearing and considering the totality of the evidence presented on the issue of mental retardation, the Court concludes that determining what constitutes mental retardation in a particular case varies sharply depending upon who performs the analysis and the methodology used.

A. Among the testimony provided was the distinction between mental retardation, a person who is learning disabled, and borderline intellectual functioning.

(1) The Court accepts as factual the distinctions made between a person being learning disabled, and mental retardation, and finds that a person who is learning disabled, or borderline intellectual functioning is not mentally retarded. (RR.IV-197; RR.V-33; RR. VII-Exh. 42) [Note that some of the school records utilized the notation LD, referring to learning disabled.]

Elroy Chester also spent portions of his school day in regular classes as opposed to resource (special education) classes. (RR. VII-Exh. 42)

The Intelligence Quotient (I.Q.) Tests

6. The Court concludes from the record and testimony that one way of measuring intelligence is by way of standardized tests. (RR. II-69) Diagnostic criteria for mental retardation does not allow intelligence quotient to be measured by any types of group test. Instead, criteria require individual testing with tests such as the Weschsler. (RR. II-70) The Weschsler Scales are the most commonly used measure. There are different Weschsler tests, shaded by the age range for which the test is deemed appropriate. These tests have become predominant in the United States, developed in the 1960's but periodically updated to account for changes in population and population knowledge. (RR. II-69-72) There are three categories of mental retardation: mild, moderate, severe and profound. (RR. II-8)

A. Individuals with mild mental retardation register generally score 55-70, plus or minus the standard error of measurement of five points, on intelligence quotient (I.Q.) tests. (RR. II-58-59; RR. III-143)

B. The testimony provided indicates that if properly administered, these tests can be viewed as being reliable measures of intelligence. (RR. II-72) The Court finds that in close cases the validity of these test scores is debatable. The testimony established that the Weschsler tests when administered are divided into two main areas or halves:

(1) Verbal portion: Questions are presented, or an individual is shown stimuli and asked to give a verbal response. It examines a variety of verbal abilities, word knowledge, fund of general information and verbal abstract reasoning. (RR. II-73-74)

(2) Performance portion: Non-verbal abilities are examined and capabilities such as visual motor coordination and the ability to differentiate essential from non-essential details are evaluated. (RR. II-74)

C. The Weschsler tests relevant to these proceedings and which were administered to Elroy Chester were the:

(1) Weschsler Intelligence Scale for Children-Revised (WISC-R)

(2) Weschsler Adult Intelligence Scale (WAIS)

5. The Court finds that the following Intelligence Quotient tests (with related dates and scores) were administered to Applicant:

A. The first test: Weschsler Intelligence Scale for Children (WISC-R) - This test was administered to Elroy Chester in March, 1977, by the Port Arthur Independent School District when he was approximately seven and a half years old. (RR. II-95-97)

(1) Verbal Score = 77
(2) Performance Score = 69
(3) Full Scale Score = 69

B. The second test: Weschsler Intelligence Scale for Children (WISC-R) - This test was administered to Elroy Chester in March, 1982, by the Port Arthur Independent School District when he was approximately 12 ½ years old. (RR. II-97-98)

(1) Verbal Score = 64
(2) Performance Score = 63
(3) Full Scale Score = 69

C. The third test: Weschsler Intelligence Scale for Children (WISC-R) - This test was administered to Elroy Chester in February, 1983, by the Port Arthur Independent School District when he was approximately 13 ½ years old.
(RR. II-99-100)

(1) Verbal Score = 70
(2) Performance Score = 87
(3) Full Scale Score = 77

D. The fourth test: Weschsler Adult Intelligence Scale (WAIS) - This was the first adult test given to Elroy Chester at age eighteen by the Texas Department of Corrections in 1987 (RR. II-102-103)
(RR. II-102-103)

(1) Verbal Score = 70
(2) Performance Score = 69
(3) Full Scale Score = 69

E. The fifth test: Weschsler Adult Intelligence Scale (WAIS) - This was given to Elroy Chester by Dr. Dan Roberts in contemplation of his trial for the offense of Capital Murder, when he was approximately twenty-nine years old.

(1) Verbal Score = 67
(2) Performance Score = 71
(3) Full Scale Score = 66

6. The Court was presented with conflicting testimony regarding the validity of the various I.Q. test scores. Elroy Chester's lawyers presented testimony through Dr. Ott that the 1983 test scores were an anomaly to be discounted. (RR. II-106-109) The State countered with testimony from Vicki Pitman, a diagnostician that the 1983 test score was more likely indicative of his abilities. (RR. IV-211) Mrs. Pitman further testified that in her opinion the 1982 scores were perhaps not valid assessments, as indicated by the fact that the school records gave no indication that the diagnostician administering the test was concerned enough to follow-up with adaptive behavior testing. (RR. II-208-210) Intelligence Quotient tests alone, without evaluations of adaptive functioning cannot be used to conclusively to resolve the issue of mental retardation. (RR. IV-236-237) The Court accordingly finds that the test results from both the 1982 and the 1983 Intelligence Quotient tests are inconclusive as they remain subject to differing interpretations.

7. The Court finds that the test results from the Intelligence Quotient (I.Q.) tests taken by Applicant during his lifetime do not conclusively establish that Applicant is mentally retarded for the following reasons. The evidence established that Intelligence Quotient tests alone, without an evaluation of adaptive functioning can not conclusively establish mental retardation. The court finds that in cases wherein some, but not all, full-scale scores are within the "margin of error" attributed to intelligence quotient tests, additional issues result in inherent concerns about the validity and significance of the results, to wit:

A. The margin of error with I.Q. tests is plus or minus five (5) points. (RR. III-143) This type of testing is not and never has been considered an exact science. (RR. III-145-146)

B. I.Q. tests are "normed," based upon population, using imprecise information. Dr. Ott testified as to the validity of test results, but conceded he had no knowledge of who the tests were normed upon. He further knew nothing about the socio-economic background of the individuals Elroy Chester was associated with during his educational years in order to assess peerage. (RR. III-125)

C. The first three tests given, all WISC-R's are no longer in use and have been republished because they are outdated. (RR. III-126) The current standard is the WISC-III, which Elroy Chester was not given during his formative years. The Weschsler tests have been accused of being culturally biased. (RR. III-146) The change in the test since given to Elroy Chester were at least partially due to the need to deal with cultural bias that seemed to be exhibited in the test. (RR. IV-204) Numerous articles can be found dealing with cultural bias in standardized tests can be found. (RR. III-146) Elroy Chester is a black male who grew up in Port Arthur, Texas. (RR. III-146, 256) Dr. Ott had no knowledge about the culture of Southeast Texas, nor how various cultural aspects may have impacted upon Elroy Chester. (RR. III-146) Mrs. Pitman testified training discussions involved concerns that cultural bias within the WISC-R tests could result in scores as much as a ten (10) point lower score. (RR. IV-212)

D. Numerous additional factors can affect intelligence quotient scores, including:

(1) The test-taker being hungry or sick, or the room being too hot or cold. (RR. IV-253)

(2) Where and when the test was taken, including time of day or night. (RR. III-147-148)

(3) Circumstances under which the test was taken. (RR. III-148)

(4) The competency and training or lack thereof of the test-giver (RR. III-150)

(5) Whether the test-taker may be having a bad day. (RR. III-150)

(6) Whether the test-taker is fatigued. (RR. III-154)

(7) Whether the test-taker suffers from ADHD. (RR. III-155)

(8) Reading disabilities (RR. III-155)

(9) Peer pressure (RR. III-155)

(10) Learning disabilities (RR. III-155)

(11) The fact that portions of the test involve subjective grading. (RR. III-148)

(12) Whether raw scores were correctly or incorrectly totaled. (RR. III-155)

(13) Whether the chronological age of the test-taker is calculated correctly or incorrectly. (RR. III-155)

8. The Court finds that experts evaluate intelligence quotient test results in different manners that can have significant impact upon interpretation of those results. For example, the testimony presented indicates that the entirety of the Texas educational system differs from the proponent's position about the significance of the verbal and performance scores as opposed to placing primary emphasis only upon the "full scale score." Mrs. Pitman testified that

the standards under which a high school diagnostician operates are set by the Texas Education Agency and the Federal government, and that all Texas schools adhere to the same standards. (RR. IV-183-184) In the Texas education system, the verbal and performance scores on I.Q. tests must both be below 70, and the adaptive behavior measure must also be below 70 to be classified as mentally retarded. Full-scale scores are not considered alone. (RR. IV-206) This court cannot overlook the fact that it is a function of the Texas education system to gain an idea of the student's strengths and limitations as well as educational needs for purposes of developing a viable plan of educational intervention. (RR. IV-171-172) The Court finds that by the standard used by the Texas education system, even if all test scores were considered absolutely valid, Elroy Chester would have scored above the mental retardation range on the tests given in 1977, 1983, 1987, and 1998. The Court finds unpersuasive Applicant's claims that the intelligence quotient test scores establish an accurate assessment of Elroy Chester's intelligence for purposes of determining whether he is mentally retarded.

Adaptive Behavior

9. The Court makes the following fact-findings regarding the evidentiary factors extolled by the Texas Court of Criminal Appeals in **Ex parte Briseno** as they relate to adaptive behavior:

> A. Whether individuals who knew Elroy Chester best during the developmental states of his life believed him to be mentally retarded at the time is subject to disagreement. However, the Court finds that the record does not reflect that family, friends, teachers and employers acted in accordance with a belief that he was mentally retarded.

(1) The Court finds that in the developmental stages of his life, he was classified as "learning disabled," not mentally retarded.

(2) The Court heard testimony indicating that the Texas education system utilizes a process known as Admission Review and Dismissal Committees (ARD's) in assessing student needs for special education programs. Each ARD committee is comprised of an administrator, an assessment person, a special education teacher, a regular education teacher, and a vocational representative. The committee convenes after an initial referral has been made to review the assessment information provided by the diagnostician. They either decide that a student is eligible for special education programs or not. ARD meetings are held at least once a year to review goals and objectives that the teachers have drawn up for the student. ARD's reviews are triggered by failure, disruptive behavior, failing two six-weeks in a row, behavior problems or access to new assessment data. The meetings are held to determine why the student is not being successful. (RR. IV-186-187) Elroy Chester's first ARD was triggered by speech difficulties and some slow academic progress. (RR. IV-192) One function of the committee is to develop goals and objectives (IEP's), that they hope the student will achieve in the coming year. (RR. IV-188-189) The Court finds that conflicting testimony was presented regarding whether the goals and objectives

outlined in multiple IEP's for Elroy Chester were actually attainable. Nevertheless, the Court finds that the goals and objectives documented do not reflect treatment of Elroy Chester as if he were mentally retarded.

(3) School records relating to Elroy Chester indicate that the Port Arthur Independent School District classified him as "Learning Disabled" and speech handicapped, not mentally retarded. (RR. IV-197) The Court finds based upon the credible testimony presented that having a "learning disability" does not mean one is mentally retarded. It means instead that the person has a processing problem, but is capable of learning given the utilization of proper teaching methods. (RR. IV-191) Mrs. Pitman testified that having a learning disability requires normal intelligence. (RR. Iv-202) Contradictory testimony was presented through Elroy Chester's teacher, Mrs. Elizabeth Segler, wherein she opined that he was "moderately retarded." (RR. IV-168) However, Mrs. Segler also testified that Elroy Chester was "certainly" capable of learning if given proper teaching methods, which is consistent with having a "learning disability." (RR. IV-172) She further testified that he had overcome problems in the educational environment and to adapt to different ways of learning. (RR. IV-173) She believed Elroy Chester would be capable of finding work as a school custodian, a restaurant kitchen, and a warehouse or as a construction laborer. (RR. IV-174)

(4) The court finds that placement in special education classes is not necessarily indicative of mental retardation. Mrs. Pitman, the high school diagnostician, testified that a fallacy exists with special education programs. Although not designed to operate in such a fashion, once someone enters special education classes at an early age, they almost never get out because the student can't catch up with the rest of the class. The student loses out on opportunities to achieve more by the time he reaches high school. (RR. IV-194) The court finds therefore that the fact that Elroy Chester attended special education classes is not indicative of mental retardation.

(5) Mrs. Pitman testified that upon graduation, the generally accepted procedure is to notify as many agencies as possible and ask them to attend an ARD meeting to provide the student with a transition from high school to the community. (RR. IV-196) The Port Arthur Independent School records reflect that Elroy Chester met academic requirements for graduation applicable to non-handicapped students. (RR. VIII-St.Exh.#8, page 9) The Court does not accept Mrs. Segler's opinion was that such a notation is a clerical error as conclusive or convincing evidence that the records' notation regarding graduation is incorrect. (RR. IV-136-137) The records do not reflect that Elroy Chester was referred to outside agencies upon graduation. (RR. IV-198) The Court finds that the school records from the Port Arthur Independent

School District, relating to Elroy Chester do not support a determination that he was treated as mentally retarded during his formative years, but instead demonstrate the School District's expectations of his capabilities were consistent with a learning disabled, but not mentally retarded individual.

B. The Court concludes that the record demonstrates Elroy Chester's actions were not entirely impulsive, but rather that he is capable of and has formulated plans and carried them through. In light of the factual information surrounding the crime spree and the commission of the primary crime, the Court finds persuasive Dr. Gripon's testimony that Elroy Chester can formulate plan and carry them through. His testimony, found credible by this court explains that although we all have impulsive conduct at times, the predominant focus of the conduct of Elroy Chester was not impulsive in nature. (RR. IV-304)

C. In light of the information contained within the trial record and the evidence presented during the hearing of this cause, the credible evidence does not establish that Elroy Chester is easily led by others, but instead reflects that he acts independently of others.

D. In light of the information gleaned from the trial record and the evidence presented during the hearing of this cause, the credible evidence does not establish that Elroy Chester's conduct in response to external stimuli is both rational and appropriate,

albeit at times socially unacceptable and at times criminal.

E. The Court finds that Elroy Chester responds coherently, rationally and on point to questions.

(1) Elroy Chester did not testify during the hearing on the Application for Writ of Habeas Corpus.

(2) Elroy Chester was evaluated during an almost three hour extensive interview by Dr. Ed Gripon, a psychiatrist with thirty two years experience. (RR. IV-263-270) Dr. Gripon has testified many times in the Courts of Jefferson County, Texas. (RR. IV-253) Dr. Gripon testified during the interview Elroy Chester responded coherently, rationally and on point to questions posed to him. He did not wander from subject to subject, but stayed on point. (RR. IV-271) Dr. Ott agreed with that assessment. (RR. III-85-86) Dr. Gripon found him to be a relatively good historian, recognizing that there were some limitations in language abilities and intellectual level. (RR. IV-271) Dr. Gripon did not have to repeat or explain what he was trying to ask. Elroy Chester could give information on any points asked, consistent with his intellectual potential (RR. IV-282) Although Dr. Ott stated he believed many of Dr. Gripon's questions to be leading in nature, Dr. Gripon testified that most of his questions did not involve yes or no answers, but instead asked Mr. Chester to provide information. (RR. IV-283) Dr. Gripon concluded that his language

skills were consistent with a person with an IQ in the borderline intellectual functioning range, which is inconsistent with mental retardation. Elroy Chester was even able to expound upon his answers. (RR. IV-289) According to Dr. Gripon, and corroborated by notes (See State's Exh. #7) taken by Dr. Ott during the interview process, Elroy Chester was able to hold discussion on numerous subjects, including but not limited to: (See RR. III, pages 77, et seq).

(a) His work history at a car dealership washing cars, a Luby's restaurant, and as a longshoreman. (RR. IV-283)

(b) His legal history and incarceration milestones, including the activities in his life that brought him to this point. (RR. IV-283-284)

(c) A discussion of his criminal activities, his efforts to locate sites to burglarize, the particular items he sought to steal and how much money particular items would bring as a result of their sale. (RR. IV-285)

(d) He discussed what he would do with the money he attained from his crimes. (RR. IV-286)

(e) His interest in sports and politics. (RR. IV-287) He expressed an interest in the Dallas Cowboys, and

discussed briefly how they fared in the playoffs.

(f) His criminal activity as a juvenile.

(g) His tours of time spent in the Texas prison system.

(h) A discussion on shock probation.

(i) The concept of parole violations.

(j) An ability to remember dates.

(k) The historical significance of the current death row Pulunsky Unit as opposed to the Ellis Unit.

(l) His disciplinary problems on death row.

(m) The fact that he likes the radio, television, magazines and music.

(n) Who was the current President of the United States, and the unlikelihood of the election of Al Sharpton, then a current candidate for the democratic nomination.

(o) How to get a letter out of death row.

(p) The keeping of a calendar in his cell.

(q) That his longest relationship was eleven months, and that if he had maintained longer relationships, perhaps he may not have ended up on death row.

(r) The participants in his trial, although he had difficulty with the names.

(s) The facts of his crime spree, including:

- The tools of his burglary trade
- The types of items he would steal and their street values
- How he selected houses for burglary
- The appropriate time of day for commission of crimes
- How he would gain access to a place to burglarize
- The best days of the week for commission of crimes
- What he would do with the money he obtained from his crimes
- How he would make his money ("Hustle") on the streets

(t) His unhappiness with the medical care in TDCJ

(u) A history of having driven a car from Texas to Los Angeles.

(v) What a prison warden is and his responsibility.

(w) He displayed an ability to work through a problem. Dr. Ott testified that when confronted with a multiplication problem involving computing the cost of multiple bars of soap from the prison commissary, that Elroy Chester was unable to do the calculations in the simplest manner, although he did arrive at the correct answer. (RR. III-121-122)

F. The record demonstrates and the Court finds that Elroy Chester is capable of hiding facts and/or can lie effectively to protect his own interests. The trial record, in Vol. IX, beginning on page 94, reflects that when Elroy Chester became a suspect in the capital murder for which he was ultimately convicted, he was asked to give a blood sample. Because he knew Tim Smith, an investigator with the Jefferson County District Attorney's Office and former Port Arthur Police Officer, he asked to speak with him first. He explained to Mr. Smith that he did not trust the officers with the Port Arthur police department, indicated that he was willing to give a sample, but wanted to wait a few weeks before doing it. (RR. IX-85) He ultimately consented to provide a sample. Mr. Chester attempted cover for himself by

telling Mr. Smith that the police department was fabricating charges against him, trying to blame him for the murder of his brother-in-law and the fireman, Willie Ryman. At that time Mr. Smith told him to stop because the police already located stolen jewelry, a mask and clothing used in the crimes. (RR. IX-89-90) Only then did Elroy Chester tell Mr. Smith that there was no point in drawing blood, and that he would take him to the gun used in the murder. (RR. IX-90-91) He apologized to Tim Smith for having caught him in a lie and tried to convince Mr. Smith that he wanted to personally put the gun in his hands. (RR. IX-92) Elroy Chester continually insisted that the gun would be hard to find and that only he knew where it was and could reach it. He told him it was unloaded, and not to worry. (RR. IX-93) Once at the house where the gun was located, Elroy Chester tried to rush ahead, despite being shackled at that point, pulled a nightstand over to a hole in the ceiling and tried to get into the hole. Police had to stop him. Once someone was up in the hole trying to locate the gun, Elroy Chester began misdirecting by telling the person to look in the opposite direction of where the gun was located. (RR. IX-94) Meanwhile Mr. Chester was trying to reach in the other direction where the gun was actually located. Tim Smith was forced to draw his weapon and instruct Mr. Chester to stop what he was doing and have him removed. Police then found the full "loaded" weapon right where Chester was reaching. (RR. IX-95-96) Only then did Elroy Chester indicate he would cooperate with the police to make it as easy for his family. His father, mother and sisters were there at the time. (RR. IX-96)

G. The Court having considered the evidence of his crime(s), and putting aside any heinousness or

gruesomeness surrounding the capital offense for which he was convicted, finds that the commission of the capital crime and additional offenses produced for consideration demonstrated forethought, planning and complex execution of purpose. The record in this regard reflects more than just a single offense, but instead an extensive crime spree:

(1) **Reporter's Record/Trial-Volume IX**

Elroy Chester committed several murders beginning with a burglary in the summer of 1997. The record reflects that he committed many burglaries, a fact to which he confessed and to which he admitted to Dr. Gripon and described as "hustles." In most of those instances, he scouted the location, brought with him a weapon, flashlight, and wire cutters to cut the phone lines, and wore a mask to hide his identify. He took items of value he could dispose of for profit. He would then hide the items until selling or giving some away, and hid some things at his sister's house. Sometimes he would check several houses before deciding which one to break into.

Elroy Chester exhibited considerable forethought and planning in the set-up and murder of his brother-in-law, Albert Bolden. After lying about his motive for killing Mr. Bolden, Mr. Chester ultimately admitted that he did it because Mr. Bolden had set him up on a date with a transvestite. He took advantage of the fact that Mr. Bolden wanted to commit a burglary. They then staked out a

house, went in through the back window. Chester admitted he did not really want to commit a burglary, but had already planned that he was going to kill Mr. Bolden. In this manner he set Albert Bolden up for the killing by waiting until they were both inside the house they were burglarizing, waited for him to turn his head, then shot him. He then went to his sister's house and hid the gun, and never admitted until his confession that his the one who killed Albert Bolden.

Elroy Chester exhibited considerable forethought and planning in the murder of Cheryl Deleon. He met Ms. Deleon while working at a Luby's restaurant. He didn't like her attitude and the fact that she complained about him making sexual comments to her. On the night of the murder, he went to her home and hid outside. He waited for it to get dark, and knew she got off work at 8:00 p.m. To facilitate his plan he unscrewed the light bulb by the storage house and hid by the side of the building for thirty to forty-five minutes waiting for her to arrive. He brought his .380 pistol, was wearing gloves, and a ski mask. When she arrived home, he accosted her, demanded money and ended up shooting her in the head. He later told police that he did not mean to kill this woman, but the gun went off when he was hitting her in the head with it.

Elroy Chester exhibited considerable forethought and planning in the murder of Willie Ryman, for which he was convicted of

capital murder in this cause. After casing the house where the murder occurred, and seeing a girl inside, he watched patiently to be sure she was alone. Then he cut the phone lines, as he had in all the places he burglarized. He checked around the house for any easy point of entry and found the back door unlocked. As was typical, he was wearing a mask and gloves. Once inside he found the girl sitting on the couch. He told her he would not hurt her if she did what she was told. Then he asked for valuables. He took money and jewelry. At that point his plan went awry and he was forced to adapt to a changing scenario. The girl's sister drove up. Chester instructed the girl to tell her sister to come into the house, and that he would kill her if she did anything stupid. The sister was accompanied by a boyfriend who was also ordered into the house. Elroy Chester was at that point outnumbered three to one, so he separated the three by putting the youngest sister with her boyfriend in the bathroom. Because he had carefully "cased" the house, Elroy Chester was able to order the first girl to get some tape out of the garage. He utilized the tape to tie her up after forcing her to strip naked. Then he taped her eyes so she couldn't see. Then he stripped the other girl and the boy and taped them up also. He talked in a manner that would keep them scared. He told them, for example, that he had just gotten out of prison and that he hated all white people. Elroy Chester then forced intercourse and oral sex on the older of the two girls, and was in the process of

making the younger girl perform oral sex on him when an uncle of the girls arrived. At that time, Elroy Chester hid in the kitchen, turned off the lights, and waited for the man to enter before shooting him. In his escape, he went outside and confronted the woman waiting in a truck for the uncle and fired two times at her through the window, running off when she apparently would not open the truck. Once at his father's house, Elroy Chester removed his jacket, threw away a broken necklace taken in the incident, hid the gun in the attic and later lied to police about whether he knew anything about the incident.

The Mentally Retarded Offender Program and Borderline Intellectual Functioning

10. The Court reviewed and considered the records from the Institutional Division of the Texas Department of Criminal Justice regarding Elroy Chester's participation in the Mentally Retarded Offenders Program. Applicant presented the testimony of Dr. Henry Orloff, a licensed clinical psychologist who worked with the Department of Corrections, and at one time was a supervisor for the program. It was undisputed that Elroy Chester was enrolled and participated in the Mentally Retarded Offender Program. The Court finds however that enrollment and participation in the program is not limited to individuals who are mentally retarded. Dr. Orloff testified that participants were eligible for the program whether classified as mentally retarded or merely as borderline intellectual functioning. (RR. IV-70-71)

A. The Court finds based upon the evidence that people with borderline intellectual functioning on the

individually administered I.Q. tests will attain approximate scores between 71-84. Their adaptive behaviors are better than an individual who is mentally retarded. These persons are not mentally retarded. (RR. II-65-66)

B. The Court rejects the assertion that diagnostic coding labeling Elroy Chester only as borderline intellectual functioning rather than as mentally retarded is a coding error. First, Dr. Henry Orloff testified that he had no independent recollection of Elroy Chester apart from the documents presented for his review. (RR. IV-30-31) He did not do the psychological evaluations or the social histories on this Applicant. (RR. IV-70) He plainly testified that a person could have an I.Q. of 71 to 89 and still qualify for the program. (RR. IV-71) He said he believed his job was to surround himself with people in whom he was confident and to make sure in his mind that he was comfortable with the decisions being made. (RR. IV-72-75) Dr. Orloff explained that records notations and findings were the result of clinical teams, in whom he was confident. Upon cross-examination, Dr. Orloff remembered the names of many of the members of the clinical team members. They were psychologists, social workers, nurses, vocational assessors, and correctional officers. (RR. IV-75-83) The psychologists conducted the evaluations. The social workers were responsible for assessments of adaptive behavior. The vocational assessors would make assessments of job training. The correctional officer had the responsibility of observing the inmate's adaptive behavior in the housing areas of the institution. (RR. IV-23-26) Dr. Orloff testified at one point that he regarded the records maintained at the evaluation process as reliable historical

documents, and that he had no reason to question the recitation of the steps taken and the data that was reported and that he did much of the training. (RR. IV-30) The Court found particularly significant and troubling, Dr. Orloff's assertions that emphasis was placed upon determining eligibility for the program rather than "quibbling" over a diagnosis. (RR. IV-46-47, 70)

The Court finds Dr. Orloff's testimony asserting that the diagnostic coding within the records of the Mentally Retarded Offender Program is unconvincing and not supported by the greater weight of credible evidence. He said that the diagnostic code labeling Elroy Chester as borderline intellectual functioning is incorrect and the coding should have reflected mild mental retardation. In light of his testimony regarding the make-up, training and supervision of the clinical team responsible for the coding, the Court finds this testimony not credible. The coding at issue is found in multiple documents, (Individualized Rehabilitation Plans) with approximately twenty-six individuals bearing the responsibility for the label of "borderline intellectual functioning," and some of those documents contain the notation within the body of the report's. The evidence does not suggest a coding error. (RR. IV-75-94; Trial Exhibits Vol VI-#3-214, #3-216, #3-218, #3-219, #3-222, #3-226, #3-230, #3-233)

C. The Court finds the testimony of Zelma Coleman and Gloria Sanders, both sisters of Elroy Chester, to establish only that Elroy Chester appeared to have had learning disabilities, but not that he was mentally retarded. Zelma Coleman

testified that Elroy was a typical kid. He was hard to understand as a child because of a speech defect, (mispronouncing words and stuttering) but that he got better as he grew up. (RR. III-250-253) However, she also said she didn't know how well he did in school because she moved out of the home when he was only ten or eleven years old. She therefore wasn't around him during a large portion of his life. (RR. III-250-261) The Court considered the testimony of Gloria Sanders to shed little additional light upon the overall circumstances of her brother's intellectual functioning and adaptive behavior, particularly when balanced with the overall record in this cause. Ms. Sanders additionally exhibited unusual behavior that cast a shadow over her credibility when exhibiting anger at the court's brief interruption of her testimony. (RR. III-272) The Prosecutor asked her why she turned and made a face at the judge. Her response was that it was irrelevant, she was nervous, and that if she did that she apologized. Then she said she had no idea what the prosecutor was talking about. (RR. III-281-282) Her testimony otherwise appeared to claim she had to do most things for Elroy as he was growing up. The Court finds that such assertions were not credible in light of the overall record, particularly the school records of the Port Arthur Independent School District.

CONCLUSIONS OF LAW

1. The burden of proof in a Writ of Habeas Corpus action is upon the applicant to prove his allegations by a preponderance of the evidence. ***Hall v. State,*** **2004 Tex.Crim.App. LEXIS 817;** ***Ex parte Briseno,*** **2004 Tex.Crim.App. LEXIS 199; Ex parte Richardson, 70 S.W.3d (Tex.Crim.App. 2002);** ***Valdez v. State,*** **82 S.W.3d 784**

(Tex.App.-Corpus Christi 2002). Mental retardation is comparable to an affirmative defense, and thus, the burden is always upon the defendant to prove that condition by a preponderance of the evidence regardless of when the claim is presented. ***Hall v. State*, 2004 Tex.Crim.App. LEXIS 817.** The Court finds that Applicant has failed in its burden to prove by a preponderance of the evidence that he is mentally retarded.

A. The evidence does not support a finding that Applicant suffered nor suffers from a disability characterized by (1) significantly sub-average intellectual functioning; (2) accompanied by related limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18.

2. The Texas Court of Criminal Appeals has provided Courts with evidentiary factors which fact-finders in the criminal trial context should focus upon in weighing evidence to assist in determining issues of mental retardation. Those factors are:

A. Did those who knew the person best during the developmental state - his family, friends, teachers, employers, authorities - think he was mentally retarded at that time, and, if so, act in accordance with that determination?

B. Has the person formulated plans and carried them through or is his conduct impulsive?

C. Does his conduct show leadership or does it show that others lead him around?

D. Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

E. Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

F. Can the person hide facts or lie effectively in his own or other's interests?

G. Putting aside any heinous or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning and complex execution of purpose?

This Court's review of evidentiary factors relating to adaptive behavior suggested relevant by the Court of Criminal Appeals in ***Ex parte Briseno*, 2004 Tex.Crim.App. LEXIS 199**, Weigh Conclusively Against Applicant's argument that he is mentally retarded.

3. A trial judge's findings of fact are afforded almost total deference, especially when those findings of fact are based upon credibility and demeanor. ***Hall v. State*, 2004 Tex.Crim.App. LEXIS 817**.

4. Mental retardation issues do not require a jury determination of mental retardation in a post-conviction proceeding. There is no mechanism set out in the applicable habeas corpus statute, article 11.071 that provides for a jury trial on an issue first raised in a post-conviction habeas corpus proceeding. ***Ex parte Briseno*, 2004 Tex.Crim.App. LEXIS 199**.

Cause No. 76044-B

THE STATE OF TEXAS	*** IN THE CRIMINAL**
VS.	*** DISTRICT COURT OF**
ELROY CHESTER	*** JEFFERSON COUNTY, TEXAS**

ORDER

THE CLERK IS HEREBY ORDERED to prepare a transcript of all papers in Cause No. 76044-B and transmit same to the Court of Criminal Appeals, a provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. All of the applicant's pleadings filed in this cause, including his application for writ of habeas corpus;
2. All of the Respondent's pleadings filed in this cause, including the Respondent's Original Answer;
3. Any affidavits filed in this cause;
4. This Court's Findings of Fact, Conclusions of Law and Order denying relief in this cause;
5. The indictment, judgment, sentence, docket sheet, trial record including the Clerk's Record and the Reporter's Record, and any appellate record in this cause, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER ORDERED to send a copy of the Court's Findings of Fact and Conclusions of Law, including its order to Applicant's counsel, Feldman & Orlansky, 500 L Street - Suite 400, Anchorage, Alaska 99501 and the Jefferson County District Attorney's Office, P.). Box 2553 - Beaumont, Texas 77701.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 76044.B

SIGNED this 26th day of July, 2004.

s/Charles Carver
Presiding Judge
Criminal District Court
Jefferson County, Texas

APPENDIX C

State Definitions of Mental Retardation and Adaptive Functioning

State Definitions of Mental Retardation and Adaptive Functioning

ALABAMA

ALA. CODE § 15-24-2(3) (2006): MENTALLY RETARDED PERSON. A person with significant subaverage general intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period, as measured by appropriate standardized testing instruments. [Adopted for social services purposes, not for criminal law purposes]

Ex Parte Perkins, 851 So. 2d 453, 455-56 (Ala. 2002) (not adopting any definition for criminal cases, because defendant in that case did not meet "even . . . the broadest definition of mental retardation")

Tarver v. State, 940 So. 2d 312, 321 (Ala. Crim. App. 2004) (directing trial court to consider both the definition from the social services statute and the guidelines in *Atkins* (citing 536 U.S. at 308 n.3, which contains the DSM-IV and AAMR 9th edition criteria for assessing adaptive functioning))

Holladay v. Campbell, 463 F. Supp. 2d 1324, 1343-46 (N.D. Ala. 2006) (analyzing adaptive functioning using the AAMR 9th edition criteria)

ARIZONA

ARIZ. REV. STAT. ANN. § 13-703.02(K)(1) (2007): "Adaptive behavior" means the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group.

(K)(3): "Mental retardation" means a condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen.

ARKANSAS

ARK. CODE ANN. § 5-4-618(a)(1) (2006): "mental retardation" means: (A) Significantly subaverage general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than age eighteen (18) years of age; and (B) A deficit in adaptive behavior.

CALIFORNIA

CAL. PENAL CODE § 1376(a) (2007): "mentally retarded" means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.

In re Hawthorne, 105 P.3d 552, 556-57 (Cal. 2005) (noting that the legislative definition derives from the AAMR and DSM clinical definitions and holding that a prima facie claim of mental retardation requires expert opinion referring to the deficits in the AAMR and DSM categories)

COLORADO

COLO. REV. STAT. § 18-1.3-1101(2) (2007): "Mentally retarded defendant" means any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period.

CONNECTICUT

CONN. GEN. STAT. § 1-1g(a) (2007): mental retardation means a significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.
(b) "adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for the individual's age and cultural group.

DELAWARE

DEL. CODE tit. 11g § 4209(d)(3)d.1 (2007): "Adaptive behavior" means the effectiveness or degree to which the individual meets the standards of personal independence expected of the individual's age group, sociocultural background and community setting, as evidenced by significant limitations in not less than 2 of the following adaptive skill areas: communication, self-care, home living, social skills, use of community resources, self-direction, functional academic skills, work, leisure, health or safety.
(d)(3)d.2: "Seriously mentally retarded" . . . means that an individual has significantly subaverage intellectual functioning that exists concurrently with substantial deficits in adaptive behavior and both the significantly subaverage intellectual functioning and the deficits in adaptive behavior

were manifested before the individual became 18 years of age.

FLORIDA

FLA. STAT. ANN. § 921.137(1) (2007): "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. . . . "adaptive behavior" . . . means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

GEORGIA

GA. CODE ANN. § 17-7-131(a)(3) (2006): "Mentally retarded" means having significantly subaverage general intellectual functioning in or associated with impairments in adaptive behavior which manifested during the developmental period.

IDAHO

IDAHO CODE ANN. § 19-2515A(1)(a) (2007): "Mentally retarded" means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intellectual functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years.

ILLINOIS

725 ILL. COMP. STAT. 5/114-15(d) (2007): In determining whether the defendant is mentally retarded, the mental retardation must have manifested itself by the age of 18. . . . In order for the defendant to be considered mentally retarded, a low IQ must be accompanied by significant deficits in adaptive behavior in at least 2 of the following skill areas: communication, self-care, social or interpersonal skills, home living, self-direction, academics, health and safety, use of community resources, and work.

INDIANA

IND. CODE 35-36-9-2 (2007): "mentally retarded individual" means an individual who, before becoming twenty-two (22) years of age, manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive functioning; that is documented in a court ordered evaluative report.

Pruitt v. State, 834 N.E.2d 90, 108 (Ind. 2005) (interpreting *Atkins* to require "at least general conformity" with the AAMR and DSM-IV definitions, and noting that states "are free to impose a higher standard, but the minimum definition of mental retardation sufficient to meet the national consensus found in *Atkins* must be uniform"; "if a state's definition of mental retardation were completely at odds with the definitions accepted by those with expertise in the field the definition would not satisfy the prohibition")

KANSAS

KAN. STAT. ANN. § 21-4623(e) (2006): "mentally retarded" means having significantly subaverage general intellectual functioning, as defined by K.S.A. 76-12b01 and amendments

thereto, to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law.
§ 76-12b01(a): "Adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group and community. (d) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from birth to age 18.

KENTUCKY

KY. REV. STAT. ANN. § 532.130(2) (2006): A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period is . . . a seriously mentally retarded defendant.

Bowling v. Commonwealth, 163 S.W.3d 361, 368 n.7 (Ky. 2005) (quoting *Hill v. Anderson,* 300 F.3d 679, 682 (6th Cir. 2002), for proposition that the Supreme Court "presumably expected that states will adhere to these clinically accepted definitions [in the AAMR and DSM] when evaluating an individual's claim to be retarded")

LOUISIANA

LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1) (2006): "Mental retardation" means a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.

MARYLAND

MD. CODE ANN. CRIM. LAW § 2-202(b)(1) (2007): a defendant is "mentally retarded" if: (i) the defendant has significantly below average intellectual functioning . . . and an impairment in adaptive functioning; and (ii) the mental retardation was manifested before the age of 22 years.

MISSISSIPPI

Hughes v. State, 892 So. 2d 203, 216 (Miss. 2004) (applying the AAMR 9th edition and DSM criteria and stating that mental retardation requires "significant limitation in adaptive functioning in two skill areas")

Foster v. State, 848 So. 2d 172, 175 (Miss. 2003) (adopting "the standard or definition of mental retardation . . . enunciated by the Supreme Court in *Atkins,* especially the American Psychiatric Association's definition of mental retardation" and citing DSM-IV at 39-46, thus incorporating the adaptive functioning criteria)

MISSOURI

MO. ANN. STAT. § 565.030(6) (2007): "mental retardation" . . . refer[s] to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

NEBRASKA

NEB. REV. STAT. § 28-105.01(3) (2006): "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior.

NEVADA

NEV. REV. STAT. § 174.098(7)(2006): "mentally retarded" means significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.

NEW JERSEY

State v. Jimenez, 908 A.2d 181, 184 n.4 (N.J. 2006) (following the DSM-IV definition, including with respect to finding significantly subaverage adaptive functioning if the defendant has deficits in two of the listed categories, because the parties agreed to this approach)

NEW MEXICO

N.M. STAT. ANN. § 31-20A-2.1(A) (2007): "mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior.

NEW YORK

N.Y. CRIM. PROC. LAW § 400.27(e) (2007): "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of

eighteen. [*See also People v. Lavalle,* 817 N.E.2d 341 (N.Y. 2004) (holding the N.Y. death penalty unconstitutional in other respects)]

NORTH CAROLINA

N.C. GEN. STAT. ANN. § 15A-2005(a)(1)(a) (2007): Mentally retarded. - Significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18.
(a)(1)(b): Significant limitations in adaptive functioning. - Significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills.

OHIO

State v. Lott, 779 N.E.2d 1011, 1014 (Ohio 2002) (stating that "[c]linical definitions of mental retardation, cited with approval in *Atkins,* provide a standard for evaluating an individual's claim of mental retardation" and citing the AAMR and DSM definitions quoted in *Atkins* that require "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction")

Hill v. Anderson, 300 F.3d 679, 682 (6th Cir. 2002) (noting that *Atkins* cited with approval the clinical definitions of mental retardation "and presumably expected that states will adhere to these clinically accepted definitions when evaluating an individual's claim be be retarded")

OKLAHOMA

Blonner v. State, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006) (stating that Oklahoma follows the definition that a person is mentally retarded "(1) If he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others; (2) The mental retardation manifested itself before the age of eighteen (18); and (3) the mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work.")

PENNSYLVANIA

Commonwealth v. Miller, 888 A.2d 624, 630-31 (Pa. 2005) (adopting the three-part test for mental retardation and adopting either the AAMR or DSM criteria for establishing significantly subaverage adaptive functioning)

SOUTH CAROLINA

S.C. CODE ANN. § 16-3-20(C)(b)(10) (2006): "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

SOUTH DAKOTA

S.D. CODIFIED LAWS § 23A-27A-26.2 (2006): mental retardation means significant subaverage general intellectual functioning existing concurrently with substantial deficits in applicable adaptive skill areas.

TENNESSEE

TENN. CODE ANN. § 39-13-203(a) (2006): "mental retardation" means (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) Deficits in adaptive behavior; and (3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

In the social services context, TENN. CODE ANN. § 33-1-101(17) (2003): "Mental retardation" means substantial limitations in functioning: (A) As shown by significantly sub-average intellectual functioning that exists concurrently with related limitations in two (2) or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; and (B) That are manifested before eighteen (18) years of age.

Howell v. State, 151 S.W.3d 450, 458 (Tenn. 2004) (quoting the social services definition of subaverage adaptive functioning but not indicating whether it would apply in a criminal case)

UTAH

UTAH CODE ANN. § 77-15a-102 (2006): a defendant is "mentally retarded" if: (1) the defendant has a significant subaverage general intellectual functioning that results in

and exists concurrently with significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas; and (2) the subaverage general intellectual functioning and the significant deficiencies in adaptive functioning under Subsection(1) are both manifested prior to age 22.

VIRGINIA

VA. CODE ANN. § 19.2-264.3:1.1(A) (2006): *"Mentally retarded"* means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.
B(2): (requiring reference to multiple sources of information to assess adaptive functioning, including clinical interview, standardized tests, and educational, correctional, and vocational records)

WASHINGTON

WASH. REV. CODE ANN. § 10.95.030(2)(a) (2007): "Mentally retarded" means the individual has: (i) Significantly subaverage intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.
(d): "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

FEDERAL

United States v. Cisneros, 385 F. Supp. 2d 567, 570 (E.D. Va. 2005) (agreeing to use a jury instruction proposed by the defendant that defines "significant deficits in adaptive behavior" to mean "diminished capacity to understand and process information, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions")

United States v. Nelson, 419 F. Supp. 2d 891, 894-95 (E.D. La. 2006) (considering both the AAMR 10th edition criteria and the DSM-IV criteria because they are "essentially congruent" and not conflicting, and also holding that both the AAMR and DSM-IV definitions "reflect a national consensus" and that "should a defendant meet *either* definition, his execution is prohibited")

APPENDIX D

Texas Court of Criminal Appeals
Decisions Post-*Atkins*

Texas Court of Criminal Appeals Decisions Post-*Atkins*

Ex Parte Bell, 152 S.W.3d 103 (Tex. Crim. App. 2004): deferring to and upholding the trial court determination that defendant is mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Blue, __ S.W.3d __, 2007 WL 676194 (Tex. Crim. App. 2007): deferring to and upholding the trial court determination that defendant is not mentally retarded; applying an analysis of defendant's adaptive functioning that loosely corresponds to the AAMR skill domains and not addressing the additional *Briseño* factors

Ex Parte Bradford, No. 44,526-02 (Tex. Crim. App. unpublished decision delivered Sept. 15, 2004): deferring to and upholding the trial court determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Briseño, 135 S.W.3d 1 (Tex. Crim. App. 2004): deferring to and upholding the trial court determination that defendant is not mentally retarded, applying the seven new factors regarding adaptive functioning announced in this decision

Ex Parte Carr, No. AP-75,627 (Tex. Crim. App. unpublished decision delivered Feb. 28, 2007): deferring to and upholding the trial court determination that defendant is mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Clark, No. 37,288-02 (Tex. Crim. App. unpublished decision delivered Nov. 20, 2002): deferring to and upholding the trial court determination that defendant is not

mentally retarded, using *Briseño* factors as part of the analysis

Ex Parte Davis, No. 40,339-05 (Tex. Crim. App. unpublished decision delivered Mar. 29, 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Deblanc, No. AP-75113, 2005 WL 768441 (Tex. Crim. App. unpublished decision delivered Mar. 16, 2005): deferring to and upholding the trial court determination that defendant is mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Elizade, No. WR-48957-02, 2006 WL 235036 (Tex. Crim. App. unpublished decision delivered Jan. 30, 2006): finding defendant failed to establish a prima facie case of mental retardation and therefore denying permission to bring a second state habeas application; concurring opinion proffers analysis of adaptive functioning based on *Briseño* factors

Hall v. State, 160 S.W.3d 24 (Tex. Crim. App. 2004): finding defendant is not mentally retarded, using an analysis of adaptive functioning generally based on AAMR and DSM-IV-TR-type categories, and not mentioning *Briseño* factors

Ex Parte Henderson, No. WR-37658-03, 2006 WL 167836 (Tex. Crim. App. unpublished decision delivered Jan. 25, 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used; concurring opinion reviews the record evidence, using an

analysis that blends DSM-IV-TR skill areas and *Briseño* factors

Ex Parte Hines, No. WR-40347-02, 2005 WL 3119030 (Tex. Crim. App. unpublished decision delivered Nov. 23, 2005): deferring to and upholding the trial court's determination that defendant is not mentally retarded, with insufficient analysis to know what standards for adaptive functioning were used

Ex Parte Lewis, __ S.W.3d __, 2006 WL 3499222 (Tex. Crim. App. 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Lewis, No. 44,725-02 (Tex. Crim. App. unpublished decision delivered June 29, 2005): deferring to and upholding the trial court's determination that defendant is not mentally retarded (opinion not available)

Ex Parte Mathis, No. WR-50772-03, 2006 WL 2706745 (Tex. Crim. App. unpublished decision delivered Sept. 20, 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Modden, 147 S.W.3d 293 (Tex. Crim. App. 2004): deferring to and upholding the trial court's determination that defendant is mentally retarded, noting that the parties agreed that the defendant is mentally retarded, and the trial court used the criteria of the AAMR and DSM-IV-TR because the evidentiary hearing was held before *Briseño;* dissenting justices would have found defendant not

mentally retarded, using a *Briseño*-based analysis of adaptive functioning

Ex Parte Moore, No. WR-42810-03, 2007 WL 283113 (Tex. Crim. App. unpublished decision delivered Jan. 31, 2007): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used [*see Moore v. Dretke,* 2005 WL 1606437 (E.D. Tex.) (finding defendant is mentally retarded, without analyzing adaptive functioning under *Briseño), vacated due to procedural default, Moore v. Quarterman,* 454 F.3d 484 (5th Cir. 2006)]

Penry v. State, 178 S.W.3d 782 (Tex. Crim. App. 2005): reversing death sentence because of improper instructions, but not criticizing jury instruction that defined mental retardation in terms of the DSM-IV-TR criteria, including the definition that significant deficits in adaptive functioning are established by deficits in 2 of the 10 listed skill areas

Ex Parte Richard, No. WR-47911-02, 2007 WL 841768 (Tex. Crim. App. unpublished decision delivered Mar. 21, 2007): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Rivera, No. 27,065-02 (Tex. Crim. App. unpublished decision delivered July 25, 2003): finding defendant did not submit sufficient evidence to state even a prima facie case of mental retardation [*see also Rivera v. Dretke,* 2006 WL 870927 (S.D. Tex.) (finding defendant is mentally retarded, analyzing adaptive functioning without reference to the *Briseño* factors)]

Ex Parte Robinson, No. WR-57,207-01 (Tex. Crim. App. unpublished decision delivered May 23, 2007): deferring to and upholding the trial court determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Rodriguez, 164 S.W.3d 400 (Tex. Crim. App. 2005): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Simms, No. AP-75625, 2007 WL 602814 (Tex. Crim. App. unpublished decision delivered Feb. 28, 2007): deferring to and upholding the trial court determination that defendant is mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Simpson, 136 S.W.3d 660 (Tex. Crim. App. 2004): deferring to and upholding the trial court's determination that defendant is not mentally retarded, noting that trial court did not have the benefit of *Briseno;* appellate opinion addresses some *Briseño*-type factors

Ex Parte Stevenson, No. AP-75639, 2007 WL 841127 (Tex. Crim. App. unpublished decision delivered Mar. 21, 2007): deferring to and upholding the trial court determination that defendant is mentally retarded, without any reference to the standards for adaptive functioning used, but observing that the state agreed that defendant is mentally retarded

Ex Parte Taylor, No. WR-48498-02, 2006 WL 234854 (Tex. Crim. App. unpublished decision delivered Feb. 1, 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards of adaptive functioning used by

the trial court; concurring opinion examines record with respect to *Briseño* factors

Ex Parte Thomas, No. WR-16556-04, 2006 WL 3692644 (Tex. Crim. App. unpublished decision delivered Dec. 13, 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards of adaptive functioning used

Ex Parte Valdez, 158 S.W.3d 438 (Tex. Crim. App. 2004): deferring to and upholding the trial court determination that defendant is mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Vasquez, No. 50,801-02 (Tex. Crim. App. unpublished order without opinion issued Mar. 10, 2004): upholding trial court determination that defendant is not mentally retarded

Ex Parte Wesbrook, No. WR-52120-02, 2007 WL 841763 (Tex. Crim. App. unpublished decision delivered Mar. 21, 2007): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Wilson, No. WR-46,928-02 (Tex. Crim. App. unpublished decision delivered Nov. 10, 2004): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Woods, No. WR-44,856-02 (Tex. Crim. App. unpublished decision delivered Apr. 27, 2005): deferring to and upholding the trial court's determination that defendant

is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Wooten, No. WR-47,160-02 (Tex. Crim. App. unpublished decision delivered Apr. 12, 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

63

(3)

No. 06-1616

FILED
AUG 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

ELROY CHESTER,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ERIC J.R. NICHOLS
Deputy Attorney General for Criminal Justice

*Counsel of Record

GENA BUNN
Chief, Postconviction Litigation Division

*ELLEN STEWART-KLEIN
Assistant Attorney General
Postconviction Litigation Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1600

ATTORNEYS FOR RESPONDENT

CAPITAL CASE

QUESTION PRESENTED

Whether consideration of the *Briseño* factors in assessing an individual's adaptive skills renders Texas' test for mental retardation constitutionally inadequate under *Atkins*?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

I. Course of Proceedings and Disposition Below 1

II. Facts of the Crime 3

III. The *Atkins* Hearing 7

A. Intellectual Functioning And Onset Before Eighteen 7

B. Adaptive Functioning 8

ARGUMENT 11

I. The Question Presented for Review Is Unworthy Of the Court's Attention. 11

II. The State Court Reasonably Applied The Law Established by *Atkins*. 12

A. *Atkins* Does Not Mandate The Adoption Of A Particular Definition Of Mental Retardation. 13

B. The Texas Test For Mental Retardation Is Constitutionally Adequate. 13

C. *Briseño* Does Not Hold That Antisocial Personality Disorder And Mental Retardation Are Mutually Exclusive. 19

D. Chester's Claim That There Is A Systemic Effort By Texas To Execute The Mentally Retarded Is Unfounded. 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases **Page**

Allen v. Wright, 468 U.S. 737 (1984) 20

Atkins v. Virginia, 536 U.S. 304 (2002) ..... *passim*

Chester v. Cockrell, No. 02-41152 (5th Cir. Feb. 26, 2003) (not designated for publication) 3

Chester v. Johnson, No. 5:00-CV-152, slip op. (E.D. Tex. Jul. 26, 2002) (unpublished). 2

Chester v. State, No. 73,193, slip op. (Tex. Crim. App. Jan. 26, 2000) 2

Clark v. Quarterman, 457 F.3d 441 (5th Cir. 2006) 18

Ex parte Blue, — S.W.3d —, 2007 WL 676194 (Tex. Crim. App. March 7, 2007) (not yet released for publication) 17

Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004) ..... *passim*

Ex parte Chester, No. 45,249-01 (Tex. Crim. App. May 31, 2000) (*per curiam*) (unpublished order) 2,8

Ex parte Chester, No. 75,037 (Tex. Crim. App. Feb. 28, 2007) ..... *passim*

Ex parte Elizalde, No. 48957-02 (Tex. Crim. App. Jan. 30, 2006) (unpublished) 17

Ex parte Modden, 147 S.W.3d 293 (Tex. Crim. App. 2004) . 17

TABLE OF AUTHORITIES, Continued

Cases **Page**

Ex parte Taylor, No. 48498-02 (Tex. Crim. App. Feb. 1, 2006) (unpublished) 17

In re: Anderson Hawthorne, Jr., 105 P.3d 552 (Cal. 2005) . 18

In re Hearn, 418 F.3d 444 (5th Cir. 2005) 19

In re Salazar, 443 F.3d 430 (5th Cir. 2006) 19

Kyles v. Whitley, 498 U.S. 931 (1990) 12

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 20

Moore v. Quarterman, 454 F.3d 484 (5th Cir. 2006) 18

Moreno v. Dretke, 450 F.3d 158 (5th Cir. 2006) 18, 19

Morris v. Dretke, 413 F.3d 484 (5th Cir. 2005) 15

Morrison v. State, 583 S.E.2d 873 (Ga. 2003) 18

Murray v. Giarratano, 492 U.S. 1 (1989) 12

Rodriguez v. Quarterman, 2006 WL 1900630, No. SA-05-CA-659-RF, slip op. (W.D. Tex. Jul. 11, 2006) 18

United States v. Webster, 421 F.3d 308 (5th Cir. 2005) 19

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 20

TABLE OF AUTHORITIES, Continued

Cases **Page**

Van Tran v. Tennessee, 2006 WL 3327828, No. W2005-01334-CCA-R3-PD, slip op. (Tenn. Crim. App. Nov. 9, 2006) 17

Constitutions, Statutes and Rules

U. S. CONST., amend. VIII ..... *passim*

U.S. CONST. art. III, § 2 19

28 U.S.C. 1257(a) 1

TEX. HEALTH & SAFETY CODE § 591.003(13) 15

MISCELLANEOUS

AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (9th ed. 1992) 14,15

AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (10th ed. 2002) 14,16

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Text Revision, 4th ed. 2000) 16

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, Elroy Chester ("Chester"), was properly convicted and sentenced to die for the brutal murder of Willie A. Ryman III. Chester now claims that he is mentally retarded and his execution would violate the Court's holding in *Atkins v. Virginia*. He requests that the Court review the Texas Court of Criminal Appeals decision to deny his application for state habeas relief. However, Chester's petition is premature, as well as entirely meritless. Consequently, the Court should deny his petition.

OPINION BELOW

The Court of Criminal Appeals denied Chester's successive state writ application on February 28, 2007. *Ex parte Chester*, No. 75,037, slip op., 2007 WL 602607 (Tex. Crim. App. Feb. 28, 2007) (unpublished) (copy included in Appendix A to Chester's petition for certiorari).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"Cruel and unusual punishments [shall not be] inflicted." U.S. CONST. amend. VIII.

STATEMENT OF THE CASE

I. Course Of Proceedings And Disposition Below

In August of 1998, Chester pleaded guilty to the offense of capital murder and was sentenced to death by a Texas jury. CR

87; 21 RR 50-51.[1] His sentence was automatically appealed to the Court of Criminal Appeals, which affirmed in an unpublished opinion on January 26, 2000. *Chester v. State*, No. 73,193, slip op. (Tex. Crim. App. Jan. 26, 2000). Chester did not petition the Court for certiorari review.

On November 17, 1999, Chester filed a state application for a writ of habeas corpus with the trial court in which he argued that his death sentence violated an Eighth Amendment proscription against executing mentally retarded offenders. 1 SHCR-01 11-12, 30-34. On May 31, 2000, the Court of Criminal Appeals found that the Constitution did not bar the execution of individuals with mental retardation and denied habeas corpus relief. *Ex parte Chester*, No. 45,249-01 (Tex. Crim. App. May 31, 2000) (*per curiam*) (unpublished order).

On May 22, 2001, Chester filed a petition for writ of habeas corpus with the federal district court. During the pendency of Chester's petition the Court decided *Atkins*, holding that the execution of mentally retarded offenders violates the Eighth Amendment's prohibition against cruel and unusual punishments. 536 U.S. 304. Soon thereafter, the district court entered an order conditionally granting Chester's federal writ petition. *Chester v. Johnson*, No. 5:00-CV-152, slip op. (E.D. Tex. Jul. 26, 2002) (unpublished).

The State appealed to the United States Court of Appeals for the Fifth Circuit. Finding Chester's claim unexhausted, the Court of Appeals remanded the case to the district court with

---

[1] As a reference, "CR" refers to the clerk's record of pleadings and documents that were filed with the trial court; "RR" refers to the court reporter's transcript of the trial proceedings; "SHCR-01, -02" refer to the clerk's record of pleadings and documents filed during Chester's first and second state writ proceedings, respectively; and "SHRR-02" refers to the court reporter's transcript of Chester's second state writ proceedings. All references are preceded by volume number and followed by page number, where applicable.

instructions to dismiss the petition without prejudice in order for Chester to pursue his claim in the state court. *Chester v. Cockrell*, No. 02-41152 (5th Cir. Feb. 26, 2003) (not designated for publication).

The Court of Criminal Appeals denied relief after the trial court found the evidence insufficient to show that Chester is mentally retarded. *Ex parte Chester*, Application No. 75037. The instant petition for a writ of certiorari followed.

II. Facts of the Crime

On the evening of February 6, 1998, Chester broke into a house in Port Arthur, Texas, while seventeen-year-old Erin DeLeon ("Erin") was at home alone with her one-and-a-half-year-old son, Tony. 18 RR 5-11. Chester grabbed Erin by the ponytail and put a gun to the back of her head, demanding any jewelry or money that was in the house. *Id.* at 12-17. Erin complied and led Chester into the bedrooms, where she surrendered various pieces of jewelry. *Id.* at 17-21. Chester then directed Erin back into the living room and ordered her to turn off all the lights and draw the blinds. *Id.* at 21-22. However, the two were interrupted when Erin's younger sister, Claire DeLeon ("Claire"), returned home with her boyfriend, Tim. *Id.* at 23-25. Chester confronted Claire and Tim at gunpoint and demanded any jewelry or money that they might have. *Id.* at 25-29. He then ordered the pair into the bathroom. *Id.* at 30.

Once Chester was alone again with Erin, he ordered her to take off her clothes and covered her eyes with duct tape. *Id.* at 30-32. He then called for Tim to come into the dining room, where he ordered him to take of his clothes and duct taped his head, hands and legs. *Id.* at 32-34. Chester then dragged Tim into one of the bedrooms. *Id.* at 34. When he returned, Chester called for Claire to come into the dining room and told her to take off her clothes. *Id.* at 35. He taped Claire's eyes and had the two naked

sisters lie next to each other on the floor. *Id.* at 35-36. Chester then raped Erin. *Id.* at 38. He then pulled her up by the hand, sat in a chair, and forced her to perform fellatio. *Id.* at 38-39. As he did so, he held a gun to Erin's forehead and told her that he hoped she would "bite it so he could blow [her] head off." *Id.* at 40. After Chester finished with Erin, he forced Claire into oral sex and repeated the same threat. *Id.* at 41.

At approximately the same time, the girls' uncle, Willie Ryman ("Ryman"), arrived at the house to check on his nieces with his girlfriend, Marcia Sharp ("Marcia"). *Id.* at 41, 61-62. As Marcia waited in the car, Ryman entered the house through the back door. *Id.* at 62-64. Chester met Ryman at the door and killed him by shooting him once through the torso. 17 RR 133-34; 18 RR 42-43. Chester initially fled from the house, but then turned and tried to get back inside. 18 RR 43-44, 65-68. However, he found that the door had been locked behind him. *Id.* at 65-68. Chester then turned his attention to Marcia, who still sat in the driveway inside Ryman's car. *Id.* at 69-70. When Chester was unable to get in through the locked car door, he began to shoot at the door in an attempt to "pop" the lock open. *Id.* at 70-72. As Marcia screamed for help, Chester backed away, looked at Marcia, and fired two shots at her. *Id.* He then retreated down the street. *Id.* at 73.

After Chester's arrest, he provided police with a written statement admitting to the burglary, rapes and murder. 25 RR at Exhibit 118, pp. 4-7. Police also located the murder weapon and the stolen jewelry hidden inside Chester's house. 18 RR 88-96, 161-63; 19 RR 91-96. Finally, DNA testing on the semen taken from Erin on the night of the murder matched Chester's DNA profile. 18 RR 140-41, 150-51; 19 RR 36-37, 46-47.

The evidence presented at trial also revealed that Chester had committed a string of similar crimes in the months leading up

to the Ryman murder.[2] On August 3, 1997, six months before the murder of Willie Ryman, Chester burglarized the home of Kenneth Risinger. 16 RR 35-40; 19 RR 109; 25 RR at Exhibit 118, pp. 3-4. There, he obtained the .380 semi-automatic pistol that he later used to shoot several victims.[3] 16 RR 40; SX 118. Six days later, Chester broke into the home of ten-year-old Rolaycia Mouton while wearing a hockey mask. 16 RR 44; 17 RR 104; 25 RR at Exhibit 122. Chester then forced Rolaycia into a closet, tied her up with tape, and anally raped her. 17 RR 104; RX 122; *see also* 16 RR 62; 18 RR 147-48; 19 RR 26-29, 78.

On the night of August 16, 1997, Chester attempted to burglarize two homes and ended up shooting the residents. First, Chester awoke sixteen-year-old Oscar Morales by shouting through his bedroom window and demanding money. 16 RR 75-76; SX 121, p. 2. When Morales tried to leave the room, Chester shot him in the leg. 16 RR 75-76; 25 RR at Exhibit 121, p. 2. Later that evening, Chester awakened Matthew Horvarich in a similar manner. 16 RR 84-89; 25 RR at Exhibit 121 p. 2. When Horvatch got up and came to the window, Chester shot him in the shoulder. 16 RR 89; 25 RR at Exhibit 121, p. 2.

On September 20, 1997, Chester murdered seventy-eight-year-old John Sepeda during another burglary. Sepeda, who had

---

[2] Even before Chester's arrest, Port Arthur police had recognized that the series of recent burglaries, assaults, rapes and murders in the Port Arthur area shared a similar *modus operandi*. 16 RR 34, 93, 106; 17 RR 24; 18 RR 84. For instance, at many of the burglarized homes, Chester would cut the telephone lines, unscrew outdoor security lights, and wear a mask to conceal his identity. *See, e.g.*, 16 RR 39, 98-99; 17 RR 17, 104, 117-18, 123; 18 RR 9-10.

[3] The evidence adduced at trial suggested that Chester used the .380 in the shooting deaths of Willie Ryman, John Sepeda, Cheryl DeLeon, Etta Stallings, and Albert Bolden. *See, e.g.*, 16 RR 106 (.380 shell casing at Sepeda crime scene); 18 RR 159-63 (bullets recovered from bodies of Ryman, DeLeon, Stallings, and Bolden matched characteristics of .380 found at Chester's house). Chester apparently attempted to use some object to alter the physical characteristics of the barrel. 18 RR 158, 163-64. He also filed off the gun's serial number. 16 RR 27; 18 RR 164.

been sleeping in his bedroom with his wife and grandchild, apparently awoke and was surprised by Chester. 16 RR 101-03; 25 RR at Exhibit 117, pp. 2-4. Chester then fired a single bullet into Sepeda's chest and fled with various pieces of property. 16 RR 101-02; 25 RR at Exhibit 117, pp. 2-4.

On November 15, 1997, Chester murdered eighty-seven-year-old Etta Mae Stallings during a burglary of her home. Chester entered the home through an open window, and ultimately shot Stallings through the throat when he found her in her bedroom. 16 RR 112-19; 25 RR at Exhibit 119, pp. 2-3. After he killed Stallings, Chester went to a nearby home and watched two women through an open bedroom window. 25 RR at Exhibit 119, pp. 3-4. Chester then fired his gun through the window several times, striking the two women and their dog. 17 RR 14-17; 25 RR at Exhibit 119, pp. 3-4.

On November 20, 1997, Chester murdered forty-year-old Cheryl DeLeon, whom he had worked with at a nearby Luby's cafeteria. 17 RR 27-28; 25 RR at Exhibit 120, pp. 3-4. Chester surprised DeLeon in the driveway of her home as she approached her back door. 17 RR 27-33; 25 RR at Exhibit 120, pp. 3-4. Chester attempted to rob her, and then shot her through the neck. 25 RR at Exhibit 120, pp. 3-4.

On December 7, 1997, Chester shot Lorenzo Coronado in the head as Coronado returned to his home. 17 RR 53-59; 19 RR 99; 25 RR at Exhibit 121, p. 3. Chester then stole Coronado's wallet and left him for dead. 19 RR 99; 25 RR at Exhibit 121, p. 3.

Finally, in late December, 1997, Chester murdered his brother-in-law, Albert Bolden, after they broke into a house together. 17 RR 63-69; 18 RR 161-63; 19 RR 101; 25 RR at Exhibit 118, pp. 2-3. Chester ultimately explained to police that he had murdered Bolden because Bolden had set him up with a

transvestite and then teased him about the encounter. 19 RR 107-08.

III. The *Atkins* Hearing

As more fully explained below, the State of Texas uses a three-part test to determine whether individuals fall within the range of mental retardation sufficient to render a sentence of death unconstitutionally cruel. *See* Argument, Section II(B), *infra*. Under this definition, a person is within the range if he has three characteristics: (1) significantly subaverage general intellectual functioning (an IQ of about 70 or below); (2) related limitations in adaptive behavior; and (3) onset of the first two characteristics before the age of eighteen. *Ex parte Briseño*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004). The following evidence was presented.

A. Intellectual Functioning And Onset Before Eighteen

In March 1977, when he was seven years old, the Port Arthur Independent School District (PAISD) administered the Wechsler Intelligence Scale for Children (WISC-R) to Chester. 2 SHRR 96-97. Chester received a verbal score of 77, a performance score of 65, and a full-scale score of 69. *Id.* at 95-97. The PAISD again administered the WISC-R to Chester in March 1982, when Chester was twelve years old. *Id.* at 98. That time he received a verbal score of 64, a performance score of 59, and a full-scale score of 69. *Id.* The PAISD administered the WISC-R a third time in February 1983, when Chester was thirteen years old. Chester received a verbal score of 70, a performance score of 87, and a full scale score of 77. *Id.* at 100. The Texas Department of Corrections administered the Wechsler Adult Intelligence Scale to Chester in 1987, when Chester was eighteen years old. 2 SHRR 102. Chester received a verbal score of 70, a performance score of 69, and a full scale score of 69. *Id.* at 103. Evidence regarding onset before the age of eighteen was not disputed. *Ex parte*

Chester, Application No. 75,037 at 4.

B. Adaptive Functioning

With respect to the second characteristic of mental retardation, the Court of Criminal Appeals has developed seven criteria—the *Briseño* factors—to identify individuals whose adaptive functioning is sufficiently limited. Those criteria are:

(1) Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?

(2) Has the person formulated plans and carried them through or is his conduct impulsive?

(3) Does his conduct show leadership or does it show that he is led around by others?

(4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

(5) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

(6) Can the person hide facts or lie effectively in his own or others' interests?

(7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense

> require forethought, planning, and complex execution of purpose?

Ex parte Briseño, 135 S.W.3d at 8-9.

The Court of Criminal Appeals summarized the findings of the trial court with respect to these factors:

> The trial court's findings addressed all seven evidentiary factors listed in *Briseño*, and noted carefully how [Chester] had failed to persuade the trial court on each one. For example, in response to the first *Briseño* question ("Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?"), the trial court found that [Chester] had been classified during his school years as "learning disabled," rather than as mentally retarded. Conflicting testimony was presented regarding the flexible and often confusing standards under which such classifications were made in the Port Arthur Independent School District. Nevertheless, the trial court considered and found more credible the testimony of Vicki Pitman, a diagnostician and witness for the State. Pitman testified that [Chester]'s school records labeling him as learning disabled were accurate, and that having a learning disability is not the same thing as being mentally retarded. The trial court likewise was unpersuaded by [Chester]'s witness Elizabeth Segler, who was [Chester]'s teacher and who said that, in her opinion, [Chester] was moderately retarded. The trial court found Segler's testimony to be contradictory, in that she also

testified that [Chester] was "certainly" capable of learning if given proper teaching methods, which is also consistent with having a learning disability.

The trial court made similar findings in regards to the planned, rather than impulsive, nature of [Chester]'s conduct as shown by the facts of the case itself, as well as to the fact that in all of his crimes he acted independently of others instead of being led around. The court found no evidence in either the trial record or the hearing to establish that [Chester]'s conduct in response to external stimuli was irrational or inappropriate, regardless of its social acceptability.

As to whether [Chester] responded coherently and rationally to oral or written questions, the trial court considered the testimony of both parties' experts regarding an evaluation of [Chester] conducted by Dr. Ed Gripon, the State's expert. The court was more persuaded by Dr. Gripon's testimony that [Chester] was able to converse with him coherently on a wide variety of topics, including current politics, the concept of parole violations, and many specific facts of the crimes to which [Chester] had confessed. The trial court also noted the discrepancy in credentials between the two experts, particularly that, while Dr. Gripon had been practicing in the field of psychiatry for thirty-two years and had testified in Texas courts on issues of mental retardation numerous times, [Chester]'s expert had been licensed for six years, in which time he had held a total of seven jobs, none for longer than two years. The trial court found the State's expert's testimony to be more credible.

> The trial court also found that [Chester] was capable of hiding facts and lying to protect his own interests, as demonstrated by the episode in which he told the investigators that he would take them to where he had hidden his gun, all the while apparently planning to get to the gun himself before the investigators could. Finally, the court found that the specifics of the various crimes to which [Chester] confessed, including the use of masks and gloves, his practice of cutting exterior phone lines before entering homes to burglarize, and his deliberate targeting of victims like Cheryl DeLeon and his brother-in-law Albert Bolden, showed persuasively that [Chester] was capable of forethought, planning, and complex execution of purpose.

Ex parte Chester, No. 75,037 at 8-10.

ARGUMENT

I. The Question Presented for Review Is Unworthy of the Court's Attention.

Chester seeks review of the Court of Criminal Appeals' decision to deny his state habeas application. However, since there is no constitutional right to state habeas corpus proceedings or appointed counsel therein, it follows that the denial of a state habeas application does not present a federal question for certiorari review. Justice O'Connor described the role of state habeas corpus proceedings as follows:

> A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid

> criminal judgment. Nothing in the Constitution requires the States to provide such proceedings ... nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.

Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring).

Similarly, Justice Stevens has noted that:

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring). Chester has counsel and his *Atkins* claim is currently pending in federal habeas proceedings. Thus, it appears that "the more appropriate avenue" is available to Chester.

II. The State Court Reasonably Applied The Law Established By *Atkins*.

Chester claims that the state court's reliance on the *Briseño* factors "disregards the scientific criteria for measuring adaptive functioning" and ignores the Court's pronouncements in *Atkins*. Petition at 18. Specifically, he objects with the *Briseño* factors because they fall outside the American Association on Mental Retardation ("AAMR") and American Psychiatric Association ("APA") definitions. *Id.* However, Chester's claim for habeas relief fails because *Atkins* does not mandate the adoption of a particular definition of mental retardation and the standard adopted

by Texas is constitutionally adequate.

A. *Atkins* Does Not Mandate The Adoption Of A Particular Definition Of Mental Retardation.

In *Atkins* the Court held that "the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." 536 U.S. at 321 (internal quotation omitted). The Court noted that, "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." *Id.* at 317. "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Id.* The Court then stated it would fall to the states to determine precisely how to implement this constitutional mandate:

> As was our approach in *Ford v. Wainwright* with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."

Id. at 318 (citations omitted).

B. The Texas Test For Mental Retardation Is Constitutionally Adequate.

While the Supreme Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences," it cited with approval the following definitions of mental retardation:

> The American Association of Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial

limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18."[4]

The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70.

---

[4] Although the *Atkins* Court used the AAMR's 9th edition definition, in May 2002 the AAMR released a 10th edition containing a somewhat different definition: "Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." *Compare* AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (9th ed. 1992) *with* AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (10th ed. 2002).

Atkins, 536 U. S. at 309 n. 3 (internal citations omitted); *id.* at 317 n. 22.

The Texas Court of Criminal Appeals has adopted the 1992 AAMR definition, explaining that, although Texas has not yet enacted statutory provisions to implement the *Atkins* decision, "[u]ntil the Texas Legislature provides an alternate statutory definition of 'mental retardation' for use in capital sentencing, we will follow the AAMR or [TEX. HEALTH & SAFETY CODE] section 591.003(13)[5] criteria in addressing *Atkins* mental retardation claims." *See Ex parte Briseño*, 135 S.W.3d at 8; *see also Morris v. Dretke*, 413 F.3d 484, 496, 497-98 (5th Cir. 2005) (acknowledging *Briseño*'s adoption of AAMR definition).

In Texas, adaptive behavior is defined as "the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group." TEX. HEALTH & SAFETY CODE § 591.003(13). The AAMR and APA also describe the factors in evaluating adaptive functioning. *Atkins*, 536 U.S. at 309 n.3. For example, the 1992 AAMR definition refers to "limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Id.* The APA guidelines require "significant limitations in adaptive functioning" in at least two of its list of similar skill areas. *Id.* However, just as with the assessment of cognitive IQ, adaptive functioning may be influenced by various factors independent of the individual's mental capabilities, including education, motivation, cooperation, background, personality characteristics, social and vocational opportunities, and other mental disorders or medical conditions. *See* AMERICAN

---

[5] Under the Texas Health and Safety Code, "'mental retardation' means significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." TEX. HEALTH & SAFETY CODE § 591.003(13).

PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Text Revision, 4th ed. 2000) at 42.

The Court of Criminal Appeals recognized that opinions from forensic experts on adaptive functioning can be found for both sides in most cases. *Ex parte Briseno*, 135 S.W.3d at 8-9. However, it noted that, ultimately, the "issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility." *Id.* at 9. Thus, the court developed the *Briseño* factors for use in assessing whether an individual's adaptive functioning is sufficiently limited. As noted above, these include: (1) whether those who knew him during his developmental state considered him to be mentally retarded; (2) whether he has formulated and carried out plans; (3) whether his conduct shows that he is a leader; (4) whether his conduct in response to external stimuli is rationale and appropriate, regardless of whether it is socially acceptable; (5) whether he responds coherently and rationally to questioning; (6) whether he can effectively lie to further his or others' interests; and (7) whether the crime of conviction required planning and complex execution. *Id.* at 8.

Contrary to Chester's assertions, the Court of Criminal Appeals, did not manufacture these factors out of thin air. Rather, they simply summarized the characteristics of mental retardation set forth by this very Court in *Atkins*. In *Atkins*, the Court noted that some "characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." Specifically, mentally retarded individuals:

> . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to

> understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, 536 U.S. at 318.

The *Briseño* factors parallel and are plainly derived from this description.[6]

Since *Briseño*, these evidentiary factors have been applied by the Court of Criminal Appeals in numerous cases.[7] The Tennessee Court of Criminal Appeals has adopted word-for-word much of this analysis and all of the *Briseño* factors. *Van Tran v. Tennessee*, 2006 WL 3327828, No. W2005-01334-CCA-R3-PD,

---

[6] These factors also reflect the fact that "those in the mental health profession should define mental retardation broadly" for social services purposes, while the criminal law "must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Briseño*, 135 S.W.3d at 6. As the *Briseño* court explained, "[s]ome might question whether the same definition of mental retardation that is used for providing psychological assistance, social services, and financial aid is appropriate for use in criminal trials to decide whether execution of a particular person would be constitutionally excessive punishment." *Id.* at 8.

[7] These cases include *Ex parte Elizalde*, No. 48957-02, 2006 WL 235036 at *3 (Tex. Crim. App. Jan. 30, 2006) (unpublished); *Ex parte Taylor*, No. 48498-02, 2006 WL 234854 *3-4 (Tex. Crim. App. Feb. 1, 2006) (Johnson, J, concurring) (unpublished); *Ex parte Modden*, 147 S.W.3d 293, 296-98 (Tex. Crim. App. 2004); and *Ex parte Blue*, --- S.W.3d ----, 2007 WL 676194 at *7 (Tex. Crim. App. Mar. 7, 2007) (not yet released for publication)

slip op., *23-24 (Tenn. Crim. App. Nov. 9, 2006).[8] The United States District Court for the Western District of Texas, San Antonio Division, examined the *Briseño* evidentiary factors and found that they represented "an objectively reasonable application of what is admittedly a far-from crystal-clear federal constitutional standard," in concluding that the state habeas court's application of the factors was "eminently reasonable." *Rodriguez v. Quarterman*, 2006 WL 1900630, No. SA-05-CA-659-RF, slip op. at *12-13 (W.D. Tex. July 11, 2006).

The Fifth Circuit has also dismissed Chester's contention that *Atkins* creates any criteria for a state's definition of mental retardation. *Clark v. Quarterman*, 457 F.3d 441, 445 (5th Cir. 2006), *cert. denied*, 127 S.Ct. 1373 (Feb. 26, 2007). Clark raised an analogous challenge to *Briseño*'s approach on IQ scores. "Although the [*Atkins*] Court did refer to the clinical definitions of mental retardation promulgated by the AAMR and the []APA[], it did not dictate that the approach and the analysis of the State inquiry must track the approach of the AAMR or the APA exactly... Therefore it is not 'clearly established Federal law as determined by the Supreme Court of the United States' that state court analysis of subaverage intellectual functioning must precisely track the AAMR's recommended approach." *Id.* In fact, the Fifth Circuit has looked with favor on the *Briseño* jurisprudence and its adoption of the HSC 591.003(13) definition on numerous occasions. *See Moore v. Quarterman*, 454 F.3d 484, 491-93 (5th Cir. 2006); *Clark v. Quarterman*, 457 F.3d at 444-47; *Moreno v. Dretke*, 450 F.3d 158, 163 (5th Cir. 2006) (state court's use of Briseno factors to assess adaptive functioning not unreasonable

---

[8] The Tennessee court affirmed the denial of relief and noted "Despite the testimony of the Petitioner's experts and the fact that the State presented no evidence, the trial court rejected the results of the standardized tests and the opinions of the Petitioner's experts. The Petitioner implies that this fact, alone, is error. . . we note that the trial court is neither bound by the opinion of expert witnesses nor by test results. Rather, the court may weigh and consider all evidence bearing on the issue of retardation." *Id.* (citing *In re: Anderson Hawthorne, Jr.*, 105 P.3d 552, 559 (Cal. 2005) and *Morrison v. State*, 583 S.E.2d 873, 876 (Ga. 2003)).

application of *Atkins*), *cert. denied*, 127 S. Ct. 935 (2007); *In re Salazar*, 443 F.3d 430, 432 (5th Cir. 2006); *United States v. Webster*, 421 F.3d 308, 312 (5th Cir. 2005); *In re Hearn*, 418 F.3d 444, 446-47 (5th Cir. 2005).

C. *Briseño* Does Not Hold That Antisocial Personality Disorder And Mental Retardation Are Mutually Exclusive.

Ancillary to his primary claim, Chester asserts that *Briseño* stands for the proposition that antisocial personality disorder and mental retardation are mutually exclusive and the *Briseño* factors are only a mechanism for separating the two. Petition at 18-19. But *Briseño* holds no such thing. The Court of Criminal Appeals stated in this very case that the *Briseño* factors are a "series of questions to help fact-finders determine whether applicants have 'deficits in adaptive behavior.'" *See Ex parte Chester*, No. 75,037, slip op. at 3; *see also Moreno*, 450 F.3d at 164 (observing that the *Briseño* factors are "criteria for courts to use in assessing whether a prisoner's 'adaptive functioning' is sufficiently limited").

Chester extrapolates from the *Briseño* facts a holding where none exists. In *Briseño* the defense expert diagnosed mental retardation while the State's expert found no mental retardation but did find evidence consistent with antisocial personality disorder. *Ex parte Briseño*, 135 S.W.3d at 17. However, *Briseño* never explicitly or implicitly holds that it is impossible to have both antisocial personality disorder and mental retardation. Chester's interpretation is erroneous and ignores how the *Briseño* factors have been used in practice—including in his own case.

D. Chester's Claim Of That There Is A Systemic Effort By Texas To Execute The Mentally Retarded Is Unfounded.

In Appendix D, Chester provides a list of post-*Briseño*

mental retardation decisions. He asserts that the Court of Criminal Appeals "track record [in evaluating mental retardation claims] manifests that Texas plainly intends to continue to execute people who commit heinous crimes, even when they suffer mental retardation." Petition at 19. However, Chester lacks standing to challenge the application of the law in another's case. Standing is a vital component of the "case or controversy" requirement under Article III, section 2 of the Constitution and is jurisdictional in nature. U.S. CONST. art. III, § 2; *Allen v. Wright,* 468 U.S. 737, 750 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 475-76 (1982).[9] Chester lacks standing to challenge the decisions in these other cases or to express generic complaints about *Briseño* outside of its application in his case.

Notwithstanding, Chester these cases do not show that Texas "systemically allows the execution of mentally retarded offenders." Petition at 19. Chester's citations show that the Court of Criminal Appeals found seven out of thirty-three individuals mentally retarded. *Id.* Chester fails to provide any basis of comparison that proves that this is unusual. Likewise, Chester cites two cases in which a federal district court reversed decisions where the Court of Criminal Appeals found insufficient evidence of mental retardation. *Id.* at n. 32. Again, Chester fails provide any basis of comparison that would suggest that this is unusually high rate of reversal. His assertions here are simple opinion and of no probative value.[10]

---

[9] The "irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact[.] ... Second, there must be a causal connection between the injury and the conduct complained of .... Third, it must be likely ... that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (internal quotation marks and citations omitted).

[10] Of course, it goes without saying that simply because an error was made in another case, it does not follow that any error was made in Chester's case.

CONCLUSION

For the foregoing reasons, the Court should deny Chester's petition for a writ of certiorari.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ERIC J.R. NICHOLS
Deputy Attorney General
for Criminal Justice

GENA BUNN
Chief, Postconviction
Litigation Division

*ELLEN STEWART-KLEIN
Assistant Attorney General
Postconviction Litigation Division

*Counsel of Record

STEPHEN HOFFMAN
Assistant Attorney General
Postconviction Litigation Division
Texas Bar No. 24048978

P. O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1600
Fax: (512) 320-8132

ATTORNEYS FOR RESPONDENT

FILED
AUG 17 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1616

IN THE
SUPREME COURT OF THE UNITED STATES

ELROY CHESTER,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PETITIONER'S REPLY MEMORANDUM

SUSAN ORLANSKY*
JEFFREY M. FELDMAN
FELDMAN ORLANSKY & SANDERS
500 L STREET, SUITE 400
ANCHORAGE, AK 99501
(907) 272-3538

TABLE OF CONTENTS

Introduction 1

Reasons for Granting the Writ 3

I. Texas's Method For Assessing Mental Retardation Results In The Execution of Mentally Retarded Defendants, In Violation of *Atkins* and the Eighth and Fourteenth Amendments 3

A. The Question Is Properly Presented For Review 3

B. *Atkins* Recognizes A National Consensus On Mental Retardation 4

C. Under *Briseño*, Texas Dissents From The National Consensus And Systematically Executes Mentally Retarded Offenders 6

Conclusion 10

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia,
536 U.S. 304 (2002) ..... *passim*

Ex Parte Bell,
152 S.W.3d 103 (Tex. Crim. App. 2004) 7

Ex Parte Briseño,
135 S.W.3d 1 (Tex. Crim. App. 2004) ..... *passim*

Ford v. Wainwright,
477 U.S. 399 (1986) 4, 9

Lawrence v. Florida,
127 S. Ct. 1079 (2007) 4

Medellin v. Dretke,
544 U.S. 660 (2005) 3

Panetti v. Quarterman,
127 S. Ct. 2842 (2007) 8, 9

People v. Superior Court,
155 P.3d 259 (Cal. 2007) 5

Pruitt v. State,
834 N.E.2d 90 (Ind. 2005) 5

Roper v. Simmons,
543 U.S. 551 (2005) 3

Smith v. Texas,
543 U.S. 37 (2004) 3

Van Tran v. Tennessee,
2006 WL 3327828 (Tenn. Crim. App. Nov. 9, 2006),
petition for cert. filed, 2007 WL 2049304
(U.S. July 16, 2004) (No. 07-62) 4

Constitutional Provisions, Codes and Rules

U.S. CONST. amend. VIII ..... *passim*

U.S. CONST. amend. XIV 3

28 U.S.C. § 1257(a) 3

28 U.S.C. § 2254(d)(1) 3

Supreme Court Rule 10 4

INTRODUCTION

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court banned the execution of the mentally retarded as excessive punishment under the Eighth Amendment. *Id.* at 321. Texas defeats the constitutional restriction by applying a test for determining mental retardation that enjoys no support within the professional community and effectively excludes most Texas defendants, who, like petitioner Elroy Chester, meet nationally accepted clinical definitions of mental retardation. This Court should grant certiorari to prevent Texas from continuing to execute mentally retarded citizens in violation of *Atkins*.

In this case, petitioner established that he properly is classified as mentally retarded under the established assessment factors adopted by the American Association on Mental Retardation (AAMR) and the DSM-IV-TR of the American Psychiatric Association (APA), relied upon in *Atkins*. Proof of retardation largely was established by undisputed evidence. The State of Texas does not dispute that Chester has "significantly subaverage intellectual functioning" and that he suffered its onset before the age of eighteen. [Respondent's Brief in Opposition ("BIO") at 7] Chester tested repeatedly throughout his life in the mentally retarded range on standardized IQ tests, including a full scale score of 59 when he was twelve years old.[1] Respondent also does not dispute much of the substantial evidence admitted at trial that established that Chester suffers significant deficits in adaptive functioning, as that term is used by the professional community. Indeed, Chester scored

---

[1] As it did in the trial court, respondent continues to misstate this score as 69. [BIO at 7] The Texas Court of Criminal Appeals substituted the correct score in arriving at its finding that petitioner's IQ is below 70 and that he "met his burden in demonstrating significant limitations in intellectual functioning." [App. A at 7-8]

a 57 on the Vineland Adaptive Behavior Scales (a widely accepted objective test of adaptive functioning) upon entering the Mentally Retarded Offender Program of the Texas Department of Criminal Justice at the age of 18. [App. A at 9] As the Texas Court of Criminal Appeals ("TCCA") noted, "even the State's expert witness at the [*Atkins*] hearing acknowledged that a person with a Vineland score of 57, combined with an IQ of 69 as measured at the same time, would be correctly diagnosed as mildly mentally retarded." [App. A at 9] Though noting that Chester's evidence of significantly subaverage adaptive functioning was "persuasive," the TCCA nonetheless affirmed the trial court's finding to the contrary. The Texas courts' finding that Chester does not have significantly subaverage adaptive functioning was based exclusively on the seven "evidentiary factors" that the TCCA created in *Ex Parte Briseño*, 135 S.W.3d 1 (Texas Crim. App. 2004), to "define the level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Id.* at 6. [App. A at 9; BIO at 17 & n.6]

By creating its own so-called "evidentiary factors" to assess mental retardation, Texas overrides and ignores the scientifically based clinical diagnostic definitions that inform the national consensus for determining who is mentally retarded. In so doing, Texas wrongfully deprives its mentally retarded citizens, including Chester, of the protections of *Atkins*.

REASONS FOR GRANTING THE WRIT

I. TEXAS'S METHOD FOR ASSESSING MENTAL RETARDATION RESULTS IN THE EXECUTION OF MENTALLY RETARDED DEFENDANTS, IN VIOLATION OF *ATKINS* AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. The Question Is Properly Presented For Review.

Respondent mistakenly argues that this petition is "premature." [BIO at 1] Respondent maintains that, because there is no constitutional right to state habeas corpus proceedings, "it follows that the denial of a state habeas application does not present a federal question for certiorari review." [BIO at 11] Final state court judgments deciding federal constitutional claims in state habeas corpus proceedings fall squarely within this Court's jurisdiction under 28 U.S.C. § 1257(a). *See, e.g., Roper v. Simmons*, 543 U.S. 551, 559-60 (2005); *Smith v. Texas*, 543 U.S. 37 (2004). In this case, the state's highest court rendered a final judgment on the merits of Chester's Eighth Amendment claim. That is all that is required.

Far from being premature, the question cannot be presented at any later stage of the case. On certiorari following federal habeas corpus, the question presented is likely to be not the consistency of *Briseño* with *Atkins* viewed independently, but whether, when viewed through the lens of 28 U.S.C. § 2254(d)(1), *Briseño* is an "unreasonable application" of *Atkins*. Consideration of the question presented here will provide a form of useful guidance to the lower courts - state and federal - that would not be provided by a decision of the section 2254(d) question. *See Medellin v. Dretke*, 544 U.S. 660, 664-65 (2005) (dismissing certiorari in federal habeas case for this and related reasons; anticipating that issues will be more appropriately presented

in a certiorari petition in a state habeas case); *Lawrence v. Florida*, 127 S. Ct. 1079, 1089 n.7 (2007) (Ginsburg, J., dissenting).

Respondent's citation to other courts that have noted or applied the *Briseño* factors presents a further compelling reason for certiorari to be granted. [BIO at 17-19] The issue is a recurring one. *Van Tran v. Tennessee*, which respondent cites, is the subject of a pending certiorari petition filed more recently than Chester's. 2006 WL 3327828 (Tenn. Crim. App. Nov. 9, 2006), *petition for cert. filed*, 2007 WL 2049304 (U.S. July 16, 2004) (No. 07-62). Unless certiorari is granted, lower courts will continue to decide this important constitutional question in a way that conflicts with *Atkins* and denies the protections granted by the Eighth Amendment. *See* Supreme Court Rule 10.

B. *Atkins* Recognizes A National Consensus On Mental Retardation.

This Court held in *Atkins* that the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 536 U.S. at 321 (*quoting Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). Consistent with the approach in *Ford* regarding insanity, this Court did not set forth a precise standard for assessing mental retardation. *See* 536 U.S. at 317. But the national consensus that the mentally retarded are not among the most deserving of execution necessarily implies a national consensus about who the mentally retarded are. While allowing the states to develop "appropriate ways to enforce the constitutional restriction," this Court noted that the existing state statutory definitions of mental retardation "generally conform to the clinical definitions set forth" by the AAMR and the APA. *Id.* at 317 & n.22. These clinical definitions are accepted by those with expertise in the field and must establish the "minimum definition of mental

retardation sufficient to meet the national consensus." *Pruitt v. State*, 834 N.E.2d 90, 108 (Ind. 2005).

Mental retardation is a medical condition, which is diagnosed by evaluating the cognitive functioning of the brain. Under *Atkins*, states could select any of the generally accepted definitions of mental retardation and still respect and adhere to the national consensus. A state, for example, if it preferred, could adopt the diagnostic criteria developed by the AAMR, rather than the similar - although slightly different - diagnostic criteria developed by the APA. Likewise, a state could adopt criteria that are more expansive than those promulgated by the professional bodies. *See, e.g., People v. Superior Court*, 155 P.3d 259, 266 (Cal. 2007). Adopting such a standard would ensure that individuals who test slightly above the standard cut-off point but who are, in fact, mentally retarded are not wrongfully executed.

But states are not free to undercut the criteria that define the national consensus. Texas, for example, could not set the IQ score for determining mental retardation at 65 or 60, rather than the widely accepted score of 70. Doing so would violate *Atkins* and ensure that individuals who are mentally retarded are wrongfully executed. Likewise, Texas may not adopt criteria for determining deficits in adaptive functioning that are less rigorous than those contained in the accepted diagnostic definitions of mental retardation. To do so breaks with the national consensus and inevitably results in sentencing mentally retarded citizens to death. That is exactly what Texas has done to Chester and to other defendants in Texas who have been sentenced to death, but who are mentally retarded under any nationally and medically recognized definition of mental retardation.

C. Under *Briseño*, Texas Dissents From The National Consensus And Systematically Executes Mentally Retarded Offenders.

Respondent admits that Texas assesses the adaptive functioning element of mental retardation exclusively by asking the seven, non-scientific *Briseño* questions developed by the TCCA. [BIO at 8] These questions inappropriately emphasize the facts of the crime and allow the trial court, as here, to ignore essentially undisputed evidence of mental retardation from qualified experts applying the accepted assessment criteria of the AAMR and APA. *See* Petition at 22-29. Reliance on the *Briseño* factors allows Texas to defeat a valid clinical diagnosis of mental retardation with evidence of the defendant's crimes. Indeed, through respondent's exhaustive recitation of Chester's crimes, Texas impliedly argues a proposition directly at odds with *Atkins*: that no one who commits such horrible crimes can be mentally retarded. [BIO at 3-7, 8-11]

Respondent's claim that the *Briseño* factors are derived from *Atkins* finds no support either in the opinion in *Atkins* or the opinion in *Briseño*. [BIO 16-17] The *Atkins* Court's description of "some characteristics of mental retardation [that] undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards" in no way attempted to suggest criteria to be used for the clinical diagnosis of a severe disorder affecting brain functioning. *See* 536 U.S. at 318. To the extent that *Atkins* endorsed methods for assessing mental retardation, *Atkins* cited the clinical definitions of the AAMR and the APA. *See id.* at 317 n.22. In particular, the suggestion of the *Briseño* court that the *Atkins* consensus may be limited to a narrower group of individuals than those who receive public social and educational services on account of their retardation, 135 S.W.3d at 6-8, is contrary to the *Atkins* Court's explanation of

how and why the national consensus developed. *See* 536 U.S. at 317-21.

Briseño itself makes no pretense that its factors derive from *Atkins* or any other recognized and reputable source. The TCCA provided no explanation at all for how it derived these "evidentiary factors," apart from its rejection of expert testimony which it believed "will be found to offer opinions on both sides of the issue in most cases." 135 S.W.3d at 8. In *Briseño*, the TCCA inappropriately set out to "define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Id.* at 6 (emphasis added). There may be no such level of consensus in Texas, where prior to *Atkins* - as illustrated in this case - mental retardation was considered an aggravating factor, rendering a defendant more deserving of capital punishment. *See* Petition at 3 & n.2; *see also Ex Parte Bell*, 152 S.W.3d 103, 104 (Tex. Crim. App. 2004) (Keller, P.J., concurring and dissenting) ("*Atkins* forces us to intrude upon the will of the people of Texas, as expressed by our legislature, and upon the will of the jury.") Moreover, contrary to the assumption expressly embedded in *Briseño*, it is not the "consensus of Texas citizens" whose view of mental retardation is constitutionally determinative of who lives and who dies as punishment for a crime. Rather, under *Atkins* and the Eighth Amendment, it is the national consensus. 536 U.S. at 316.

Neither the *Briseño* court nor respondent made any effort to relate the *Briseño* factors to any valid definition of mental retardation. In dismissing relevant expert testimony and accepted objective measures of intellectual functioning in favor of *Briseño*'s questions, Texas continues to execute offenders who are mentally retarded under the established clinical definitions accepted by the national consensus recognized in *Atkins*, in violation of defendants' rights under the Eighth Amendment.

Briseño's failure to credit relevant expert testimony is particularly troubling. 135 S.W.3d at 8-9. [BIO at 16] Mental retardation is a medical condition that impairs the functioning of the brain. It cannot be diagnosed by a lay fact-finder. Application of the accepted clinical definitions requires the specialized skill and training of medical professionals. Resolving conflicting expert opinions is a common and essential element of an adversarial system of justice. Such conflicts are properly resolved by the finder of fact assessing which opinion is more persuasive - not by disregarding all expert testimony and relying, instead, on a test of mental retardation created by judges out of whole cloth, un-tethered to any professionally accepted diagnostic criteria.

The flaws in the application of the *Briseño* test for significantly subaverage adaptive functioning are particularly evident in Chester's case. At trial, there was no real dispute between experts that Chester is mentally retarded as defined by the recognized definitions adopted by the AAMR and the APA. Texas's expert testified only that, in his view, Chester is not mentally retarded when evaluated solely on the *Briseño* factors. Significantly, Chester's deficits in adaptive functioning - the only element of the diagnosis of mental retardation challenged by respondent - were established by a combination of lay testimony, expert testimony, and the objective test of the Vineland Adaptive Behavior Scales. Even respondent's expert agreed that the Vineland score is a valid measure of adaptive functioning. [App. A at 9] The Texas Department of Criminal Justice itself had twice previously classified Chester to its Mentally Retarded Offenders Program. [Petition at 2-3; App. A at 9] Yet, constrained to the *Briseño* factors, the trial court and the TCCA found that Chester is not mentally retarded, ignoring all clinical evidence to the contrary.

Recently, in *Panetti v. Quarterman*, 127 S. Ct. 2842, 2860 (2007), this Court held that the test applied by the Fifth

Circuit Court of Appeals to assess a Texas prisoner's competency to be executed was based on a flawed interpretation of *Ford*. The Court of Appeals' three-factor inquiry for determining whether a prisoner is aware of the reason for his execution treated a prisoner's delusional belief system as irrelevant and disregarded clinical evidence of the prisoner's psychological dysfunction. *Id.* at 2861-62. This Court held that "[t]o refuse to consider evidence of this nature is to mistake *Ford*'s holding and its logic." *Id.* at 2862. Although *Ford* did not set forth a precise standard for competency, this Court in *Panetti* found the Court of Appeals' standard "too restrictive to afford a prisoner the protections granted by the Eighth Amendment." *Id.* at 2860.

Texas's seven-factor inquiry for determining adaptive functioning is similarly too restrictive to afford a prisoner the protections of the Eighth Amendment. The *Briseño* factors do not lead to a valid assessment of adaptive functioning. While *Atkins* allowed the states to develop appropriate ways to enforce the constitutional restrictions of the Eighth Amendment, *Panetti* counsels that the Eighth Amendment also restricts states' ability to stray from the accepted definitions of mental retardation or to establish procedures that allow the fact-finder to ignore relevant evidence of mental retardation. *Id.* at 2859-62. States may not create standards that deprive mentally retarded defendants of an exemption guaranteed by the Eighth Amendment; attempts to do so must be invalidated as "too restrictive." *Id.* at 2860. As in *Panetti*, this Court should grant certiorari to enforce the protections of the Eighth Amendment that are being thwarted by Texas's application of an invalid test for mental retardation.

CONCLUSION

The Court should grant certiorari to ensure Texas's compliance with *Atkins v. Virginia* and enforce the Eighth Amendment's prohibition against executing the mentally retarded.

Respectfully submitted,
Susan Orlansky (Counsel of record)
Jeffrey M. Feldman
500 L Street, Suite 400
Anchorage, AK 99501
(907) 272-3538

August 17, 2007

By: Susan Orlansky
Susan Orlansky
Alaska Bar No. 8106042